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# MLRC Media Law Resource Center MEDIALAWLETTER

Reporting Developments Through March 25, 2010

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# Financial Services Firms Win “Hot News” Misappropriation Case

By Jonathan Bloom

Following a four-day bench trial in which the parties contested the “hot news” misappropriation doctrine, Judge Denise Cote of the Southern District of New York, in an 89-page opinion, found in favor of the plaintiffs – Barclays Capital, Merrill Lynch, and Morgan Stanley – who had sued to enjoin the systematic, unauthorized, and typically pre-market open posting of summaries of their upgrades, downgrades and other research recommendations by the defendant’s subscription website, [theflyonthewall.com](http://theflyonthewall.com). *Barclays Capital, Inc., et al. v. Theflyonthewall.com*, No. 06 Civ. 4908 (DLC) (S.D.N.Y. Mar. 18, 2010).

The court found liability based on a straightforward application of the elements of the “hot news” tort as set out in *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (“*NBA*”), including that the defendant (referred to herein as “Fly”) was free riding on the plaintiffs’ considerable efforts to produce the research; that Fly’s conduct was in direct competition with the plaintiffs’ distribution of their research to clients; and that Fly’s conduct already had, and if not enjoined would continue to have, a demonstrable adverse impact on the plaintiffs’ investment in producing equity research.

## The “Hot News” Doctrine

The “hot news” misappropriation tort stems from the Supreme Court’s decision in *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (“*INS*”), in which the Court enjoined INS from copying AP stories from bulletin boards and early East Coast editions of AP affiliate papers and selling paraphrased versions of the stories on the West Coast in competition with AP papers.

The Court held that although anyone who purchased an AP paper was free to “spread knowledge of its contents

gratuitously, for any legitimate purpose not unreasonably interfering with [AP’s] right to make merchandise of it,” 248 U.S. at 239, INS’s conduct was a form of unfair competition. INS, the Court observed was

taking material that has been acquired by [AP] as the result of organization and the expenditure of labor, skill, and money, and which is salable by [INS] for money and . . . appropriating it and selling it as its own. . . . Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of [AP’s] legitimate business precisely at the point where the profit is to be reaped. . . .”

248 U.S. at 239-40. Such conduct, the Court held, amounted to INS “reap[ing] where it has not sown,” as it was “not burdened with any part of the expense of gathering the news.” *Id.* at 240. Nearly eighty years later, in *NBA*, in a case involving the real-time transmission of basketball scores via the defendant’s pager service, the Second Circuit held that the “hot news” tort escaped preemption by the Copyright Act, provided the plaintiff could establish the following “extra” elements:

- (i) the plaintiff generates or gathers information at a cost;
- (ii) the information is time-sensitive; (iii) the defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. *NBA*, 105 F.3d at 845.

(Continued on page 4)



In the court’s view, the effort Fly expended to gather, edit, and disseminate other firms’ research recommendations – i.e., to aggregate – “does not controvert the fact that Fly expends no effort to produce the Recommendations and does not contribute to the underlying research and analysis process.”

(Continued from page 3)

The *Barclays* court found that the plaintiffs had satisfied each of these elements.

### The Court's "Hot News" Analysis

As for the first element, there was no dispute that each of the plaintiff firms expends hundreds of millions of dollars each year to produce equity research reports. Slip op. at 57.

With respect to the time-sensitivity of the information, the record showed that the timeliness with which the plaintiffs' clients received the research recommendations was critical to clients' ability to trade on them in advance of any stock price movement, which is how they derive the maximum value from the recommendations. The testimony of the plaintiffs' witnesses established that many important clients trade almost instantly on the basis of concise "headlines" of the firms' recommendations, whether received by email, through a sales call, or otherwise.

Fly's own marketing materials, the court noted, consistently highlighted the fact that its "live newsfeed" made Wall Street "time sensitive" analyst recommendations available in "real time" so its subscribers could make informed investment decisions. Slip op. at 57-58. (Another typical Fly marketing piece promised subscribers "breaking analyst comments as they are being disseminated to Wall Street trading desks").

With respect to free riding, the Court found that

Fly's core business is its free-riding off the sustained, costly efforts by the Firms and other investment institutions to generate equity research that is highly valued by investors. Fly does no equity research of its own, nor does it undertake any original reporting or analysis that could generate the opinions reflected in the "Recommendations" section of its newsfeed. Fly's Recommendation headlines consist entirely of regurgitations of the Firms' Recommendations and those of other investment institutions. . . . Its only cost is the cost of locating and lifting the Recommendations and then entering a few keystrokes into its newsfeed software. Slip op. at 59.

In the court's view, the effort Fly expended to gather, edit, and disseminate other firms' research recommendations – *i.e.*, to aggregate – "does not controvert the fact that Fly expends no effort to produce the Recommendations and does not contribute to the underlying research and analysis process." Slip op. at 60.

The court also rejected Fly's argument that it was not free riding because it no longer lifted the recommendations from the firms' actual research reports (which it claimed to no longer access directly) but instead relied on what it characterized as "publicly available information" that "freely" circulated on "the Street" through other "market intelligence" websites, chat rooms, mainstream financial news services such as Bloomberg and Thomson Reuters, "blast IMs," and industry contacts with "people in the know."

The conduct of third parties, the court held, was not relevant to Fly's liability. Fly, the court found, was one of the first to engage in such "systematic misappropriation" of research recommendations, and the fact that similar practices may subsequently have become more common practice was not a valid excuse. Slip op. at 63. Moreover, the court noted, even if Fly had obtained the firms' research – which the firms distributed only to entitled clients – from public sources (which the record showed was not always the case), it would be no defense. After all, the court pointed out, the news at issue in *INS* was "widespread and publicly available on the East Coast" and was obtained by *INS* from public sources.

Turning to the direct competition element, the court found that the parties were "in direct competition in disseminating Recommendations to investors for their use in making investment decisions." Slip op. at 66. The production and dissemination of equity research reports – to assist clients in making investment decisions – is "one of the 'primary' businesses for each of the Firms," *id.*, and dissemination of the same research recommendations was likewise Fly's primary business.

Fly's very name, the court observed, touts its inside access to the firms' analyst opinions, which it provides in order to assist its subscribers in make better informed investment decisions. "Thus," the court found, "Fly's extensive and systematic use of the Firms' Recommendations is undertaken 'with the obvious intent, if not the effect, of fulfilling the demand for the original work.'" Slip op. at 67 (citing *Wainwright Securities, Inc. v. Wall Street Transcript*

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*Corp.*, 558 F.2d 91 (2d Cir. 1977)).

Further, the parties used similar channels of distribution. The plaintiffs transmit their research to clients by email and through password-protected web portals, while Fly runs a subscription website. The plaintiffs also license their content to third-party aggregators, while Fly likewise licenses its feed to third parties, including to some of the plaintiffs' licensees. Slip op. at 68.

The court found that Fly also has fostered competition with the plaintiffs by entering into partnerships with discount brokerage firms such as Cyber Trader, eSignal, and Newswire which facilitate the ability of Fly's subscribers to circumvent the plaintiffs in executing trades based on the plaintiffs' research, thereby diverting the trading commissions that are the principal means by which the plaintiffs fund their research. Slip op. at 68.

The court rejected Fly's argument that there is no direct competition with the plaintiffs because their clients value access to the full research reports, which Fly does not provide. To the contrary, the court noted, many of the firms' significant clients are "volume traders who quickly trade on the Recommendations with little or no opportunity to scrutinize and evaluate the actual reports." Slip op. at 70. In other words, the research "headlines" alone – exactly what Fly provides – are extremely valuable to the firms' clients and potential clients.

Finally, as for the fifth *NBA* element, the court found "ample evidence that the continued conduct of Fly, and others like Fly, would so reduce [the firms'] incentive to invest the resources necessary to produce equity research reports that the continued viability of plaintiffs' research business is and 'would be substantially threatened.'" Slip op. at 72. Rather than having to speculate, the court noted that the firms had shown that the conduct of Fly and others already had caused the firms reduce the resources they devote to their research businesses by impairing their ability to monetize the research through trading commissions.

The court was not persuaded by Fly's contention that the plaintiffs were required to provide statistical evidence of lost customers, trades, or profits attributable to Fly's conduct. Slip op. at 73.

The inquiry, the court stated, was expressly framed in *NBA* as future-oriented, based on the likely impact on the plaintiffs' incentives to produce the product or service in question if the defendant's conduct were left unrestrained; it

did not require specific prove of damages, as Fly contended. Moreover, the court held, the fact that others may be engaging in similar conduct – a centerpiece of Fly's defense – misapprehends" the legal standard, as the *NBA* test expressly requires the court to take into account the effect of free riding by other parties.

Fly pointed to a number of other factors that, it argued, were the real cause of the plaintiffs' curtailing of their investment in equity research, such as the recession, the Global Research Analyst Settlement in 2003, and the increased availability of discount electronic trading platforms that compete with the plaintiffs for trade execution business. But the court held that there was "no need to measure the exact impact" of each of these factors on the firms and their investment in research given the "persuasive evidence" presented by the firms that the misappropriation of their research by Fly and others "has also had a profound effect on their business model." Slip op. at 76.

### Injunctive Relief

As for relief, the court permanently enjoined Fly from posting on its website "summaries, abstracts, headlines, or any other synopses" of the plaintiffs' equity research recommendations or analyses before 10 a.m. for research released before the 9:30 a.m. New York market open or two hours after release for research first distributed to the plaintiffs' clients after 9:30 a.m. The injunction expressly allows the defendant, after the market opens, to refer to the plaintiffs' research "in the context of independent analytical reporting on a significant market movement in a security that has already occurred that same day," *i.e.*, to engage in news reporting.

The court expressly retained jurisdiction to enforce compliance with the injunction, and it provided that Fly may, after one year from the date of the order, request that the court modify or vacate the injunction if it can demonstrate that the plaintiffs "have not taken reasonable steps to restrain the systematic, unauthorized misappropriation of their Recommendations."

Fly has stated publicly that it plans to appeal.

*Jonathan Bloom, counsel at Weil, Gotshal & Manges LLP, represented the plaintiffs in the case along with partners Bruce Rich and Benjamin Marks and associate Jackson Wagener. Defendant was represented by Ostrager Chong Flaherty & Broitman P.C. in New York.*

# New MLRC Bulletin Examines Media Trials and Damages Over Last 30 Years

*Trends continue: Increasing media victory rate, decreasing punitive awards*

After 30 years and over 600 trials, the MLRC's latest Report on Trials and Damages has some good news: the media victories continue to rise –the percentage of media wins in the 2000s (52.1%) is much higher than the percentage in the 1980s (37.3%). Published earlier this month, MLRC Bulletin 2010:1 analyzes the media libel and privacy trials of 2009 and the statistical trends in trials in the 30 years since MLRC began compiling trial data.

There were only nine media trials in 2009. Media defendants won three and lost six trials. The average award in 2009 was \$4.6M (skewed by two very large verdicts).

## **Trials of 2009 – Defense Verdicts**

*Chapman v. Journal Concepts, Inc.* (D. Haw. jury verdict Mar. 5, 2009).

A Hawaiian federal jury returned a verdict in favor of local magazine publishers after the subject of an article brought suit. The subject, a surfer and shaper of surfboards, took exception to the author's description of his adventures in ordering a custom surfboard from him. The jury found no false statements.

*Howard v. WLOX-TV* (MISS. Cir. Ct. jury verdict Sept. 30, 2009).

A Missouri state jury found unanimously in favor of the defendant, a television station that had run an "Action Report" in which a homeowner alleged that a building contractor had done "shoddy work" and walked off the job after demanding more money.

*Stewart v. NYT Broadcast Holdings* (Okla. Dist. Ct., Okla. County jury verdict Jan. 20, 2009).

An Oklahoma state jury found in favor of several local television stations and newspapers, all of which had broadcast or published a "crime stoppers" report using a press release issued by the Norman Police Department that showed images of the plaintiff.

## **Trials of 2009 – Plaintiff Verdicts**

*Strange v. Entercom Sacramento LLC* (Cal. Super., Sacramento County jury verdict Oct. 29, 2009)

A California state jury returned one of the largest verdicts this Report has ever seen (at \$16,577,118, it is the 8th largest award) in the "Wee for Wii" case, in which a 28-year-old mother of three died after taking part in a radio show contest requiring participants to drink large amounts of water without urinating. The employees involved settled the case, so the jury verdict for wrongful death was only against the corporate parent.

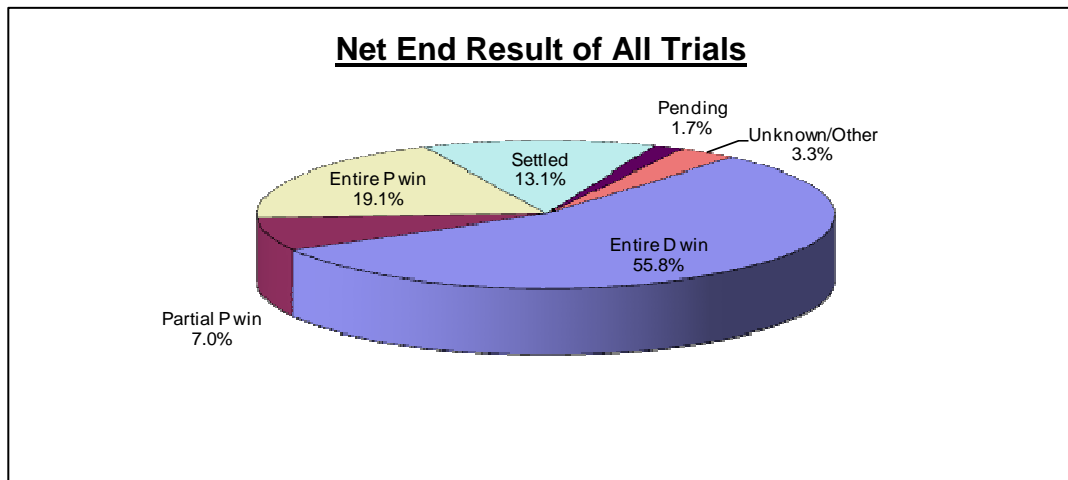
*Kennedy v. Times Publ. Co.* (Fla. Cir. Ct., Pinella Co. jury verdict Aug. 28, 2009)

A state jury in Florida found for the doctor-plaintiff after a newspaper accused him of being "under federal investigation on charges of misusing money and sexual harassment." They awarded \$5.5M in compensatory damages, and \$5M in punitive damages.

*Tan v. Le* (Wash. Super. Jury verdict Apr. 16, 2009)

A Washington state jury found for the plaintiff, a former lieutenant in the South Vietnamese army who now leads a Washington Vietnamese community. The defendants, another Vietnamese organization, had





accused Tan in their newsletter and on their website of being a communist sympathizer. The jury awarded \$225K to Tan, and \$85K to his organization.

*Trujillo v. Guaracao* (Pa. C.P. jury verdict Apr. 2, 2009)

A Philadelphia jury awarded \$210,000 total to the plaintiff, the president of the Hispanic Chamber of Commerce. The local newspapers had alleged that his appointment as president was the result of a conspiracy among chamber members.

*Stewart v. Smith* (Ga. State. Ct. jury verdict Nov. 18, 2009)

A Georgia state jury awarded \$100,000 to the plaintiff, who claimed a character in the novel *The Red Hat Club* was identifiable as her, and that she was defamed by the character's antics. She also alleged that private facts about her were revealed. A Georgia Court of Appeals decision in 2008 had dismissed many of Stewart's claims, and the jury rejected all but her libel claim.

*West v. Morehead* (S.C.C.P jury verdict June 2, 2009)

A South Carolina state jury verdict awarded \$40,000 total to the plaintiff, a local lawyer who alleged she was defamed by an article about a divorce proceeding that suggested the lawyers involved would "turn on their own clients if the retainer is juicy enough."

### Trends

Our report this year shows a continuation of trends we have noted before. Over the past 30 years: Plaintiffs are winning at trial less and less – in the 1980s the percentage of wins was 62.7%; by the 2000s it dropped to 47.9%.

Furthermore, punitive damages have dramatically dropped across the 30-year history of the report – in the 1980s, punitives constituted 61.2% of the award – but only 10.7% of the initial award in the 2000s. (However, compensatory awards have risen significantly – from an average of \$594,387 in the 1980s to an average of \$2,483,612 in the 2000s.)

At the conclusion of all proceedings – after trial, post-trial motions, and appeals – defendants totally won in 55.8 percent of cases, meaning that plaintiffs ended up with no damages in these cases. In 7.0 percent of cases, plaintiffs ended up winning some damages, but less than the amount initially awarded at trial. And plaintiffs fully won 19.1 percent of cases, meaning the initial damages amount awarded to them after trial survived through to the end of the case.

# Massachusetts Newspaper Wins Public Official Libel Trial

## *Some Lessons From a Libel Trial*

**By Jonathan M. Albano and Carol E. Head**

In February 2010, after an eight-day trial, a Brockton, Massachusetts jury returned a defense verdict in favor of *The Enterprise* newspaper and two of its editors in a public official defamation case brought by a former school committee member. *Riley v. Enterprise Publ'g Co.*, No. 05-00841-A (Mass. Super. Ct.) (Judge Jeffrey A. Locke).

### Background

The plaintiff Glenna Riley served four years as a school committee member in a school district in southeastern Massachusetts. During Riley's term in office, the Business Manager for the school district was investigated, indicted and, thereafter, convicted of stealing school funds. Over a four year period extending beyond Riley's term in office, the *Enterprise* reported extensively on the case.

Several articles described Riley as a "strong supporter" of the disgraced Business Manager. In addition to news articles, Riley also was the subject of critical editorials and opinion columns. She was described as a "troubling official," who was the "chief aggressor" against those who tried to investigate the Business Manager and as someone who "abused her power" to mount a "campaign of disinformation" attempting to defend the Business Manager.

Riley alleged that the defendants falsely accused her of being in league with a criminal and of dereliction of her duties as a school committee member. Her complaint asserted claims for defamation, negligent and intentional infliction of emotional distress and interference with advantageous business relations. Her husband also brought a claim for loss of consortium.

One oddity about the case was that the complaint was based on only four of over one dozen articles published by *The Enterprise* that were critical of Riley. By the time Riley brought suit, some of those articles no longer were within the statute of limitations. Still other articles, including two very caustic opinion columns, were published within the limitations period but were not referenced in plaintiff's complaint.

Although as a technical legal matter those other articles might show alternative causes of the plaintiff's alleged

damages for which she was not entitled to recover, placing all of the articles before the jury also might increase juror sympathy for the plaintiff and require the defendants to defend statements and characterizations contained in the articles that were not properly at issue in the case. That issue was one of several addressed in pre-trial motions discussed below.

### Jury Selection

The most striking aspect of the jury selection process was the number of potential jurors who stated that they could not be impartial because of their negative views of the press. Approximately one half of the jury pool answered affirmatively the question of whether the fact that a member of the media was a party to the case would pose a problem for them. Several said that the press did not care about the damage it inflicted on individuals and that it was impossible to compensate people for these types of injuries.

A far smaller number of people expressed reservations about personal injury plaintiffs. Three potential jurors, for example, volunteered that they were offended by the description of Mr. Riley's loss of consortium claim. One said that it was wrong for couples to try to collect money for marital problems. Another potential juror said that he believed that the suit was a waste of time for all involved, including the judge. Both groups of jurors were excused for cause. Nevertheless, it was worrisome to see firsthand the venom with which some potential jurors described the press.

### Motions in Limine

#### *1. Motion to Exclude Articles Not Sued Upon*

Prior to trial, the defendants filed a motion to exclude any reference to articles on which the plaintiff had not sued. The motion focused on articles published outside of the limitations period and on opinion columns published within the limitation period that contained harsh, hyperbolic language that might prejudice the jury. The plaintiff opposed the motion and, in addition, on the eve of trial sought to expand her claims to include the opinion columns.

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Initially, the trial court ruled that although articles not referenced in the complaint could not form the basis for any damages claims by the plaintiff, articles published within the limitations period could be introduced as evidence that the defendants “poured salt on” the plaintiff’s wounds. From the defendants’ perspective, this ruling took away with one hand what it seemed to grant with the other.

As the trial proceeded and the judge heard additional arguments on the issue, he altered his views somewhat, ultimately ruling that the articles were relevant only to the extent that they contained admissions as to the alleged falsity of the articles sued on. By the time the case went to the jury, the court emphatically instructed the jury that they were not entitled to consider these other articles in assessing damages.

### 2. Motion to Exclude Evidence of Plaintiff’s Cancer

The plaintiff, who was in her mid-sixties by the time of trial, had been diagnosed with breast cancer approximately two years after the last article about her was published and had undergone a grueling treatment process.

The defendants filed a pretrial motion to exclude any reference to the plaintiff’s illness as irrelevant and unduly prejudicial. Although the trial court agreed that the plaintiff could not suggest that the defendants were in any way responsible for causing her breast cancer, he refused to prohibit the plaintiff from comparing the experience of having breast cancer to the emotional distress she felt as a result of the articles (the plaintiff’s lawyer had indicated that the plaintiff suffered far more distress from the articles than from her illness).

Perhaps out of fear that the anticipated testimony would backfire, during trial the plaintiff made only general references to having recovered from a serious illness and did not make any specific reference to breast cancer.

### 3. Pre-Trial Actual Malice Motions

The defendants filed two pretrial motions addressing actual malice issues. The first motion, permitted under Massachusetts law, was for a directed verdict based on the plaintiff’s opening. The theory of the motion was that the plaintiff had failed to depose or to name as trial witnesses the reporters or editors who directly worked on the articles at issue.

The motion principally relied on the ruling in *New York Times v. Sullivan*, 376 U.S. 254, 287 (1964) that the “state of mind required for actual malice would have to be brought home to the persons in the [defendant’s] organization having

responsibility for the publication of the [articles at issue].”

Absent the testimony of the reporters and editors who worked directly on the articles at issue, the defendants argued, the plaintiff could not meet her burden of proving actual malice by clear and convincing evidence. The trial court reserved ruling on the motion until the end of the case. The motion was helpful, however, in focusing the court on the requirements of the actual malice standard.

The defendants also moved to prohibit the use of the term “actual malice” in the jury’s presence, suggesting instead the use of the term “knowledge of falsity requirement.” The trial court denied the motion, despite suggestions by both the United States Supreme Court and the Massachusetts Supreme Judicial Court that the better practice is to avoid the use of the term actual malice in order to minimize the risk of juror confusion. See generally *Masson v. New Yorker*, 501 U.S. 406, 511 (1991); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 868 n.9 (1975).

As the trial proceeded, however, the judge frequently bracketed the term “actual malice” with an explanation that it meant knowledge of falsity or reckless disregard of the truth, and his jury instructions were quite clear on the subject.

### 4. Witnesses’ Subjective Interpretations of the Article

The defendants also filed a pretrial motion seeking to exclude the testimony of any witness as to their subjective interpretations of the article.

The motion relied on case law holding that the interpretation of the articles is for the jury and is a function that may not be usurped by witnesses. See generally *Lambert v. Providence Journal Co.*, 508 F.2d 656, 658 (1st Cir. 1975); *Snell v. Snow*, 54 Mass. 278, 281 (1847); Fed. R. Evid. 701, Advisory Committee Notes (2000 Amendments). During trial, the judge did not permit any witness to offer their opinion as to the meaning of the articles.

## Partial Directed Verdicts

After the evidence closed, the trial court granted the defendants’ motion for a directed verdict with respect to plaintiff’s claim for negligent infliction of emotional distress and interference with business relations. Because the plaintiff was a public official, the negligent infliction of emotional distress claim was dismissed on the basis of *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). The interference with business relations claim was dismissed

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based on the lack of any admissible evidence supporting the plaintiff's claim that the articles caused the Mayor of Brockton to decide against appointing her to a paid educational post.

### **Verdict Form and Verdict**

As is often the case, an important factor in considering the special verdict form was whether, in the long run, the defendants would benefit from specific findings with respect to all four of the articles at issue or whether a detailed verdict form would give the jury too many opportunities to make findings in favor of the plaintiff.

The defendants tried to have it both ways by proposing a form that first asked the jury if the plaintiff had carried its burden of proving that the gist of the articles was not substantially true and only called for article-specific findings if the answer to the first question was "yes."

The trial court judge denied the request and used a special verdict form that required the jury to answer up to four questions for each article on the issues of falsity, defamatory content, actual malice and damages.

Consistent with the jury charge, the special verdict form also required that, under *Hustler*, a defense verdict on the libel claims required a defense verdict on plaintiff's claim for intentional infliction of emotional distress and on Mr. Riley's loss of consortium claim.

After approximately five hours of deliberating, the jury returned a defense verdict. The jury found that the plaintiff had failed to prove that the three news articles at issue contained any false statements about her. The jury also found that the one editorial at issue did contain a false statement about the plaintiff.

The verdict form did not specify which statement in the editorial was false, but it seems likely it was a statement that the plaintiff was more "concerned with protecting friends and keeping secrets" than with the education of public school students. Because the jury found that the editorial was not published with actual malice, judgment for the defendants entered without the court having to address whether that statement was a protected opinion based on disclosed facts. The defendants have not appealed.

*Jonathan M. Albano and Carol E. Head of Bingham McCutchen LLP in Boston, MA represented the defendants. The plaintiffs were represented by Elizabeth Clague of Brockton, MA.*



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# Alabama Newspaper Wins Summary Judgment in Public Official Libel Case

*Statements Substantially True, Opinion or Made Without Actual Malice*

By Dennis R. Bailey

**Public Official Libel Plaintiff:** “I don’t like that they printed about me this in the editorial: ‘It is often a rude profession, one with a reputation of calling out the incompetent buffoons and demagogues inhabiting public office.’”

**Defense Attorney:** “Isn’t that what editorials do?”

**Public Official Libel Plaintiff:** “What is a buffoon anyway?”

[**Defense Attorney’s Unspoken Answer:** An elected official who does not know what a “buffoon” is.]

The above [except the last unspoken sentence] comes from page 228 of the Deposition of City Councilperson Ben Little during his deposition in a case he filed in an Alabama Circuit Court claiming *The Anniston Star* libeled him in an article and editorial questioning whether he had a personal relationship with an independent auditor he recommended as well as his general effectiveness as an elected representative.

In the real world, I bit my tongue and moved on to the next question. Fortunately, after months of discovery and depositions of the reporter, editorial writer and publisher taken after a motion for summary judgment was filed, Circuit Judge Malcolm Street, Jr. entered a ten-page order granting summary judgment for *The Anniston Star* and its reporter one week before the case was to be tried before a jury. *Little v. Consolidated Publ’g Co.*, No. 2009-900147 (Ala. Cir. Ct. March 2, 2010).

To me, this decision helped me appreciate more fully the importance of a libel decision that arose back during the Civil Rights movement in my home town of Montgomery, Alabama. Actually, it is a case which you probably can name off the top of your head. It just so happens that the biggest libel decision in our lifetimes originated from what was at the time the largest jury verdict in Alabama entered in the Circuit Court of Montgomery County, Alabama, affirmed unanimously by the Alabama Supreme Court and then reversed by a unanimous United States Supreme Court.

Yes, I am speaking of *The New York Times v. Sullivan* case. I know one of the lawyers who tried the case and argued it (on the losing side) before the U.S. Supreme Court: “I told the Court the only way we could lose was if they changed the law of libel.” My father was a friend of L.B. Sullivan, the plaintiff. I have the *Times* advertisement: “Heed Their Rising Voices” in my desk. I have actually read the reversed Alabama Supreme Court opinion as part of teaching libel law to my media law class at Auburn University because it is a textbook on libel law prior to the establishment of actual malice as a defense.

The case of *Ben Little v. The Anniston Star* presented an ironic twist of the facts of *New York Times v. Sullivan*. Instead of a white elected police commissioner complaining to an all-white jury about an ad in the “anti-southern” *The New York Times*, Little was an African-American elected city councilmember from a predominately African-American ward of Anniston, Alabama, who sought to inflame a racially mixed jury with his perception that *The Anniston Star* criticized him either because it was racist or because the newspaper wished to profit from an opposing view on the best way to develop Anniston’s old Ft. McClellan property because its offices were built on a portion of that land.

Specifically, Little claimed that a quote from a white council member at a public meeting that there was a “buzz” in



**The case of Ben Little v. The Anniston Star presented an ironic twist of the facts of *New York Times v. Sullivan*. Instead of a white elected police commissioner complaining to an all-white jury, Little was an African-American elected city councilmember from a predominately African-American ward of Anniston, Alabama, who sought to inflame a racially mixed jury with his perception that *The Anniston Star* criticized him either because it was racist or because it wished to profit.**

(Continued from page 11)

the community that he had a “personal relationship” with an unmarried female auditor he had recommended the city hire (after renting a car to visit her and taken her out to dinner two times) was “false, defamatory and malicious” although the article went on to quote the author of the statement as saying: “If this is true it needs to be disclosed and if not true it is not fair to Mr. Little;” and despite the fact that Little, an unmarried man, was quoted as saying the allegation was false and “if true it would not involve city business.”

An editorial the next day listed a “litany of Little’s failures” and commented on the “Sweetheart Deal” Little had proposed for the auditor. Star editorial writers suggested Little was a demagogue, buffoon, crank, and very divisive to boot. It was bare knuckled criticism of a popular elected official about his job performance. But the evidence also established that Little had been offered and turned down the

opportunity to respond to the editorial in the form of an op-ed piece. Instead, Little chose to respond on a radio program he hosts and with a libel suit claiming unspecified compensatory and punitive damages.

Fortunately, after discovery was complete and the case was a week away from trial, Judge Street found that the statement that there was a “buzz” in the community that Little had a personal relationship with the auditor was either “substantially true” or never asserted or proven to be false. He also held it was “not capable of a defamatory meaning.” He further ruled the statements in the editorial were pure opinion and not statements of fact. Finally, based upon *New York Times v. Sullivan*, and its progeny, he ruled that Little had failed to come forth with “clear and convincing evidence” of actual malice sufficient to defeat a motion for summary judgment. Little’s claim under the Alabama Tort of Outrage was subsumed by the libel claim and dismissed also.

Brandy Ayers, publisher of *The Anniston Star* (which incidentally is referred to as the “Red Star” by conservatives locally because of its alleged history of “liberal” activism) had a characteristically colorful quote about the decision: “Anybody who has paid attention to city hall politics over the past few years knows the suit against *The Star* was vagrant, without any visible means of support.” Testimony in the case revealed that Ayers’ had been at the top of the KKK’s “hit-list” in the 1960s and claims that Ayers was a racist were laughable to anyone who had followed his career to the slightest degree.

The bottom line is that the case turned out the right way although getting there was expensive, contentious and unpleasant for the subjects of the suit and even their lawyers. But the case is a reminder of the dangers a libel case with racial undertones would present today in Alabama if L.B. Sullivan’s \$500,000 verdict had not been reversed by the U.S. Supreme Court in 1964. Hopefully, the *Little* decision will chill the “buffoonery” of a public official libel case in Alabama for at least a few years.

*Dennis R. Bailey, General Counsel for the Alabama Press Association and Of Counsel at Rushton, Stakely, Johnston & Garrett, P.A. in Montgomery, Alabama, represented the defendants in this case.*



# Magazine Wins Summary Judgment in Claim by Anti-Vaccine Advocate

## *Assertion That Opponent In Science Debate “Lies” Is Not Actionable Defamation*

By John B. O’Keefe

Quoting a key figure in a controversy about science as saying that one of his adversaries in the debate “lies” does not give rise to a claim of defamation against the speaker or those who publish the remark, a federal court in Virginia has ruled. The decision by U.S. District Judge Claude M. Hilton in [\*Arthur v. Offit\*](#), No. 01:09-cv-1398, 2010 WL 883745 (E.D. Va. Mar. 10, 2010), granting the defendants’ motions to dismiss, was a significant reaffirmation of the constitutional and common law protections afforded to expressions of opinion that cannot “reasonably be interpreted as stating actual facts” or otherwise lack “a provably false factual connotation.”

### Background

The case arose out of a brief passage in a 7,500-word *Wired* magazine article that profiled Dr. Paul Offit, a Philadelphia pediatrician and infectious disease specialist. Entitled *An Epidemic of Fear: One Man’s Battle Against the Anti-Vaccine Movement*, the article described how Offit – a vaccine inventor himself and an outspoken advocate of widespread, mandatory inoculation of infants, children and adolescents – had become embroiled in a vituperative debate with the activists behind a grassroots movement that objects to the systematic vaccination of children on the theory that vaccines are responsible for instances of autism and other unexplained childhood disorders.

Believing that movement to be grounded in “pseudo-science” and perceiving its growth as a threat to public health, Offit “calls to account” those whose views about vaccines he considers to be “bogus” and based upon appeals to fear over reason, the article reported.

One of Offit’s harshest critics on the other side of the vaccine debate is Barbara Loe Arthur (known publicly as Barbara Loe Fisher), cofounder and president of the National Vaccine Information Center, a Northern Virginia-based watchdog group that opposes universal vaccination. The

article, published in the November 2009 issue of *Wired*, described a speech Fisher gave at an autism conference that “mentioned Offit frequently” and “cast him as a man who walks in lockstep with the pharmaceutical companies and demonizes caring parents.” In response, Offit is quoted in the article as saying that “‘Kaflooeey theories’ make him crazy” and that Fisher “makes him particularly nuts, as in ‘You just want to scream’” because “She lies.”

Alleging defamation *per se*, Fisher filed suit in December against Offit as well as Condé Nast Publications Inc., the publisher of *Wired*, and Amy Wallace, the Los Angeles freelance journalist who wrote the article. In the complaint, which was brought in the notorious “Rocket Docket” of the Eastern District of Virginia, Fisher claimed that the two-word quotation “She lies” constituted an actionable false statement of fact about her that would cause people to conclude she lacks honesty and integrity.

### Motion to Dismiss

The defendants moved to dismiss the action on the grounds that Fisher had failed to state a cognizable defamation claim under controlling law in Virginia and the Fourth Circuit. Wallace also challenged the existence of personal jurisdiction over her, as a matter of statutory law and constitutional due process, in light of the fact that her only contacts with Virginia were a telephone interview and a couple of emails she exchanged with Fisher, all from Los Angeles, and the maintenance of a personal website/blog in California that was accessible to Internet users in Virginia.

In an opinion issued on March 10, the court agreed with defendants that Offit’s comment that Fisher “lies” was a non-actionable expression of opinion because, in context, it could not be understood as an assertion of fact that was susceptible to objective verification. (Because that ruling resulted in a dismissal with prejudice, the court did not reach the

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jurisdictional issue.) “[B]oth the nature of the statement – including that it was quoting an advocate with a particular scientific viewpoint and policy position – and the statement’s context – a very brief passage in a lengthy description of an ongoing, heated public health controversy – confirms that this is a protected expression of opinion,” the court concluded.

Rather than a literal assertion that Fisher is “a person lacking honesty and integrity . . . [who should be] shunned or excluded by those who seek information and opinion upon which to rely,” as the complaint alleged, the declaration “she lies” could only be “understood as an outpouring of exasperation and intellectual outrage over Plaintiff’s ability to gain traction for ideas that Defendant Offit believes are seriously misguided,” Judge Hilton wrote.

Readers of the *Wired* article, the court said, would reasonably expect to encounter “emphatic language on both sides [of the vaccine debate] and should accordingly understand that the magazine is merely reporting Defendant Offit’s personal opinion of [Fisher’s] views,” which are avowedly antithetical to his own.

The court also found that the statement lacked “the provably false content that is required to support a defamation action,” because it could not be verified based upon a “core of objective evidence” as required by *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Specifically, the court found that a comment such as Offit’s, implicating “the thorny and extremely contentious debate over the perceived risks of certain vaccines, their theoretical association with particular diseases or syndromes, and, at bottom, which side of this debate has ‘truth’ on their side,” is not such a statement and observed that “[c]ourts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context.”

In reaching its conclusion, the court relied upon two earlier Fourth Circuit decisions, *Faltas v. State Newspaper*, 155 F.3d 557 (4th Cir. 1998), *aff’d* 928 F. Supp. 637, 641 (D.S.C. 1996), and *Schnare v. Ziessow*, 104 F. App’x 847, 849 (4th Cir. 2004). *Faltas* involved a defamation claim arising out of the controversial position taken by the plaintiff in a newspaper op-ed regarding whether there is a “biological predisposition to homosexuality.” When the newspaper subsequently published a critical letter to the editor in which the writer asserted that the plaintiff was someone who “will lie to suit her agenda” and “views her status as [a] physician

as an opportunity to present lies as truth,” the plaintiff sued the newspaper’s publisher and the letter’s author for defamation. The Fourth Circuit summarily affirmed the district court’s conclusion that the term “lie” had been “used in the context of challenging plaintiff’s position on a given controversial subject as to which ‘experts’ obviously disagree, often in less than collegial tones” and that, in the context of a scientific debate on “a highly controversial topic as to which emotions and verbal exchanges often ran hot,” the letter did not constitute an actionable defamation because it could only be understood as “an impassioned response to the positions taken by [the plaintiff], and nothing more.”

Similarly, *Schnare* involved a dispute over revisions to the American Kennel Club’s “breed standards” for Labrador Retrievers, and specifically the published statements made by a critic of the changes. Those statements asserted that the plaintiff, an advocate for the new breed standards, had, among other things, “perpetrated” a series of “half-truths, innuendoes and outright lies.” The Fourth Circuit concluded that the plaintiff had failed to state a claim for defamation because the statements, “which on their face are accusations of lying,” were “actually vigorous and angry expressions of disagreement” and that, in the context of the challenged article, published against the backdrop of a heated dispute, would be understood as “just an ‘expression of outrage’” and of the “[‘] contempt felt’ toward [the author’s] adversary in the controversy.”

In light of these precedents and others, Judge Hilton concluded that Fisher could not maintain her defamation action: “Plaintiff may wish to defend in Court the credibility of her conclusions about the dangers of vaccines, the validity of the evidence she offers in support of those theories, and the policy choices that flow from those views – as well as her own credibility for having advanced those positions. These, however, are academic questions that are not the sort of thing that courts or juries resolve in the context of a defamation action.”

*Michael Sullivan, Seth Berlin and John B. O’Keefe of Levine Sullivan Koch & Schulz, L.L.P. represented Condé Nast Publications Inc. and Amy Wallace. Defendant Paul Offit was represented by Linda Steinman and Elizabeth Soja of Davis Wright Tremaine LLP and John McGavin of Trichilo, Bancroft, McGavin, Horvath & Judkins, P.C. Fairfax, VA. Plaintiff was represented by Jonathan Emord of Emord & Associates, P.C., Clifton, VA.*

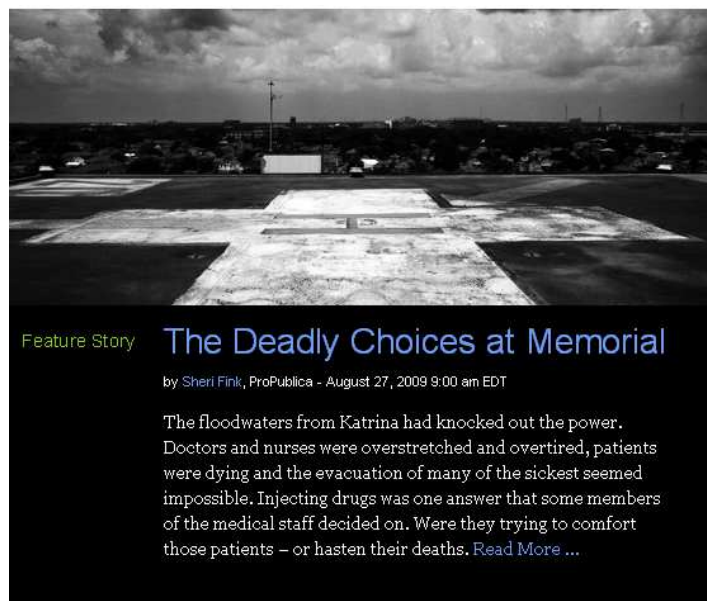


# Court Grants Newspaper's Anti-SLAPP Motion in Katrina Libel Case

A Federal district judge in Louisiana has dismissed a libel case against Pro Publica and The New York Times brought by a doctor who was on the staff of a New Orleans hospital where the deaths of several patients in the grim aftermath of Hurricane Katrina prompted an investigation into allegations of euthanasia. [\*Armington v. Fink, et al.\*](#), No. 09-6785 (E.D. La. Feb. 24, 2010) (Feldman, J.).

## Background

The case arose from a 13,000-word investigative piece written by Dr. Sheri Fink of Pro Publica, the investigative journalism nonprofit, and published in The New York Times Magazine in August 2009. Dr. Fink's article vividly documented the conditions inside Memorial Medical Center in New Orleans in August 2005 as the floodwaters rose, the hospital's power systems failed, and efforts to evacuate critical-care patients faltered. The story focused on the actions of Dr. Anna Pou and other medical professionals who administered large doses of sedatives to certain patients who could not be easily evacuated and were later found dead by rescue workers.



**The disputed story, published in the *New York Times Magazine*, focused on the actions of Dr. Anna Pou and other medical professionals who administered large doses of sedatives to certain patients who could not be easily evacuated and were later found dead by rescue workers.**

one of the doctors involved with the injections – in fact, it portrayed him as heroically working to evacuate scores of patients – he asserted in his complaint that the article implied that he had been involved in the decision to inject patients and that he showed indifference to patients by not intervening to stop the injections.

## Motion to Strike

The defendants filed a motion to strike the complaint under [Article 971](#) of the Louisiana Code of Civil Procedure, the state's anti-SLAPP statute (Strategic Lawsuit Against Public Participation). Under that statute, libel plaintiffs must show that they have a fair probability of success to avoid dismissal. The Fifth Circuit has held that the statute applies in federal libel actions brought under the federal courts' diversity jurisdiction.

The defendants argued that the article's discussion of Dr. Armington's actions was truthful and came directly from interviews with him, as reflected in notes that both Dr. Fink and a Times fact-checker had made of conversations with him. The defense motion also asserted that none of

the passages discussing the decision by medical professionals to inject patients could reasonably be read to implicate Dr. Armington in the decision-making. The article did note that Dr. Armington had chosen not to intervene with the other doctors and instead focused his energies on helping patients reach evacuation helicopters, but the same paragraph also

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made clear that he did not believe that euthanasia was taking place at that time.

Article 971 stays discovery during the pendency of the anti-SLAPP motion except by leave of the court, but the defendants made the strategic decision to produce to the plaintiff the writer's and fact-checker's notes of their conversations with Dr. Armington. Plaintiff's counsel responded by moving for additional discovery, an application that was rejected by the court.

In his opposition to the motion to strike, the plaintiff advanced a variety of theories. He claimed that the notes were inaccurate, that the anti-SLAPP statute did not apply (because the story was not "in connection with a public issue," as required by the statute), that the statute was unconstitutional (because it denied plaintiffs meaningful access to the courts), and that the statute impermissibly conflicted with the Federal Rules of Civil Procedure by limiting discovery. Dr. Armington also argued that the story should be evaluated as "commercial speech" and given less legal protection because the defendants published articles for "economic motives."

Judge Martin L.C. Feldman rejected all of the plaintiff's arguments and struck the complaint. He found that Article 971 did not conflict with summary judgment provisions in the Federal Rules because both allowed discovery at the court's discretion. He quickly rejected the plaintiff's cursory constitutional challenges and went on to conclude that the story was "in connection with a public issue" and therefore properly the subject of an Article 971 motion.

In looking at the substantive defamation issues, Judge Feldman found that general statements referring to "medical professionals" at the hospital who approved of the injections could not reasonably be read to accuse Dr. Armington of euthanasia. He also concluded, based on the notes submitted by the defendants, that the two sections of the article naming Dr. Armington were true. And, far from being defamatory, the main discussion of Dr. Armington "portrayed [him] as a doctor who, while suspecting euthanasia might occur, renewed his efforts to evacuate all of the patients."

Turning to the sentence that noted that Dr. Armington did not intervene directly with his colleagues, the court found that the statement did "not stand out as being of the nature to harm Dr. Armington's reputation any more than the simple fact that he was working at a hospital at the time that other doctors were, according to the article, involved in

euthanasia."

One noteworthy feature of the judge's opinion was his outspoken criticism of the journalism even as he granted the defendants' motion. "While the motivation in researching, writing, and publishing the article might seem ghoulish, driven in part to sell a sensational topic like the use of euthanasia in disasters, this does not, alone, cease to make the issue of how doctors have acted in previous emergencies less relevant to the discussion of what standard the public should hold doctors to in future emergencies," the court wrote. And, in a parting footnote, the judge said the court had to apply the law fairly even though "the *Times* piece selfishly resurrects melodrama to an old and sad story."

The article was recently named a finalist for Reporting in the National Magazine Awards. Dr. Armington has not indicated whether he intends to appeal.

*The defendants are represented by Loretta G. Mince and James R. Swanson of Fishman Haygood Phelps Walmsley Willis & Swanson of New Orleans. The plaintiff is represented by James E. Beasley, Jr. and Maxwell S. Kennerly of The Beasley Firm of Philadelphia and Allan Kanner of Kanner & Whiteley in New Orleans.*

## MLRC Upcoming Events

*Our 30th Anniversary  
1980-2010*

### MLRC/Stanford

#### Digital Media Conference

May 6-7, 2010 | Stanford University  
Palo Alto, CA

For more information, [click here](#).

### NAA/NAB/MLRC

#### Media Law Conference 2010

September 29-October 1 | Chantilly, VA

For more information, [click here](#).

### MLRC Annual Dinner

November 10 | New York, NY

### DCS Annual Meeting

November 11 | New York, NY

# Texas Federal Court Finds Imputation of Homosexuality Defamatory

## *Statements on Radio Show Not Satire as a Matter of Law*

A federal district court in Dallas, Texas last month refused to dismiss a libel complaint against a radio broadcasting company over on air statements by a morning show host allegedly referring to plaintiff as “gay.” [\*Robinson v. Radio One, Inc.\*](#), No. 09-CV-1203, 2010 WL 606683 (N.D. Tex. Feb. 19, 2010) (O’Connor, J.).

The court found that “judicial caution” required the court to hold that an imputation of homosexuality might still be defamatory under Texas law. In addition, the court held that the statements about plaintiff were not satire as a matter of law even in the context of a comedic radio morning show

### Background

Plaintiff Henry J. Robinson was working as a security guard at Love Field Airport in Dallas when defendant Rickey Smiley disembarked from a flight. Smiley is a stand up comedian and host of [\*The Rickey Smiley Show\*](#), which features prank calls, parody songs and hip hop music. His show is broadcast in Texas on a radio station owned by co-defendant Radio One.

Smiley posed for photographs with a number of people in the terminal, including Robinson. When Robinson asked for a second picture, however, Smiley berated him, calling him “the gay security guard” and “faggot.” Robinson alleged that colleagues and other onlookers at the airport joined in the verbal abuse. Smiley then told Robinson he planned to put him “on blast,” which Robinson understood to mean that Smiley intended to discuss him during a radio broadcast.

A few days later, Smiley referred to Robinson on his radio show, referring to him as “Henry” and “the gay security guard.” According to Robinson, after the broadcast people began calling him “gay.” Robinson sued both Rickey Smiley and Radio One, Inc. for defamation, and Radio One responded with a Rule 12(b)(6) motion to dismiss.

### Defamatory Meaning

With regard to defamatory meaning, the court explained that the imputation of homosexuality has historically been

treated as defamatory *per se* in Texas as a false imputation of criminal behavior. See *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 311 (5th Cir. 1997). The court acknowledged that sodomy was decriminalized in Texas following the U.S. Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), but found no Texas case law on whether homosexuality continues to be defamatory *per se* in the wake of *Lawrence*. Thus “judicial caution” required the court to allow the issue to be determined by a jury.

The court next considered Radio One’s argument that the statements at issue were “obvious” parody or satire, making Smiley’s on-air statements incapable of a defamatory meaning. Radio One attached a recording of the segment on its motion to dismiss. The court held that it could review the recording as part of the pleadings since it was referred to in plaintiff’s complaint and was central to the plaintiff’s claims.

However, listening to the segment failed to persuade the court that the remarks were obvious fiction. The statements included references to a worker at Love Field named “Henry,” a poem about “Henry” who “sure act[s] gay,” a crass joke about “Henry’s” personal searches, a plea for “Henry” to stop taking pictures, and a giggled “Sorry, Henry!” The court concluded that “nothing in the clip suggests parody or satire, which involve mischaracterization or exaggeration. An assertion is not necessarily parody or satire simply because it was made to provoke laughter.”

Radio One also contended that because plaintiff’s last name was never used in the broadcast it was not “of and concerning” him. The court however observed that the “true test is whether persons who know the defamed and heard the statement could have reasonably thought it to be an assertion of facts about him.” Finally the court granted Radio One’s motion to dismiss claims over statements made by Smiley at the airport. Although the court was unsure whether plaintiff intended to make any such claim against Radio One, it agreed to grant the motion insofar as any such liability was alleged.

*Plaintiff was represented by Christopher Lauren Graham of Lauren Graham PLLC, Dallas, Texas. Defendant Radio One was represented by Victor D. Vital and Emily Ann Cook of Baker Botts LLP, Dallas, Texas.*

## Section 230 Immunity Applies to Forwarded Email

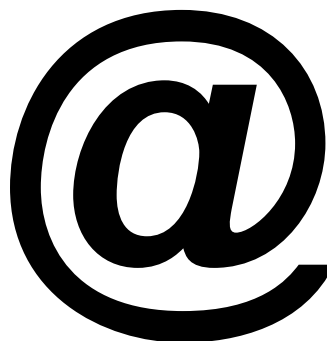
“What happens,” a California appellate court recently asked, “when you receive a defamatory e-mail over the internet and simply hit the forward icon on your computer, sending it on to someone else?” The answer under California law, at least on the facts before the court, was that you cannot be liable for defamation – even if you add a short message of your own asking recipients to read the forwarded message. *Phan v. Pham*, No. 30-2007-00100039 (Cal. App. Feb. 25, 2010) (Sills, Rylaarsdam, Ikola, JJ.). The court reasoned that while the original author of the email could be held liable, the forwarder is protected by Section 230 of the Communications Decency Act, 47 U.S.C. 230.

At issue in the case was an email written by Duc Xuan Nguyen, the president of a group of veterans from the Navy and Merchant Marine of the Republic of Vietnam. In the email, Nguyen claimed that plaintiff Hung Tan Phan had been disciplined by the Navy for his “abusive behavior” during the last days of the Vietnam War. The email was received by defendant Lang Van Pham who forwarded it to a fellow veteran, adding by way of introduction: “Everything will come out to the daylight, I invite you and your classmates to read the following comments of Senior Duc . . . .”

The California Supreme Court dealt with a similar issue in *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006). In that case, the defendant received an alleged defamatory article via email and posted the article to a newsgroup website. The state high court remarked that “at some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source.” However, since the defendant in *Barrett* republished the defamatory article without changes and therefore had no active involvement in its creation, the court found that the defendant was clearly protected by Section 230, which immunizes all content

providers who “publish” content provided by a third party.

Defendant Phan’s inclusion of an introduction with Nguyen’s original email made the instant case slightly different from *Barrett*. Since Phan attached new content to the original email before forwarding it, the appellate court had to engage in an additional stage of analysis to resolve the issue of liability. To do so, it applied the Ninth Circuit’s “material contribution” test, which boils down to the principal that immunity is only lost if the defendant’s own acts “materially contribute to the illegality of the internet message.” *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (2008).



The court found that Pham’s introduction made no material contribution to the alleged defamation in the original email, as its sentiment was simply “the truth will come out in the end.” The court also found that Phan’s decision to send the email, just like the website operator’s decision to “publish” the defamatory article in *Barrett*, did not itself amount to material contribution.

Interestingly, the court mentioned in a footnote the Ninth Circuit’s decision in *Batzel v. Smith*, 333 F.3d 1018 (2003), which added an additional qualification to the analysis.

According to *Batzel*, if an editor reposts material “that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination.” See *Batzel*, 333 F.3d at 1033.

The factual issue of whether the defendant in this case believed the email was intended to be forwarded was apparently not argued. *Plaintiff Hung Tan Phan acted pro se. Defendant Lang Van Pham was represented by Mark Rosen and Dina L. Nguyen.*

# Proposed Amendment to California's Right of Publicity Statute Would Harm Media

## *Adds Insult to Injury in the Guise of Protecting Minors*

By Douglas E. Mirell

Last year, California's then-Assembly Speaker Karen Bass successfully carried legislation (Assembly Bill 524) that, for the first time, exposed media outlets to potentially crushing damage awards if they initially purchase audio, video or still photos they know to have been taken in violation of the state's 10-year-old anti-paparazzi statute. See "Compounding the Felony: California's Amended Anti-Paparazzi Statute," [MLRC MediaLawLetter Oct. 2009](#) at 24.

Though no longer Assembly Speaker (and now a candidate for Congress), Bass is back this year with a dangerous new bill [A.B. 2480](#) that attempts to import only selected elements of that same anti-paparazzi law into California's 40-year-old right of publicity statute in the guise of protecting minors.

### Background of California Civil Code Section 3344

On February 19, 2010, Bass introduced Assembly Bill 2480 which seeks to amend California [Civil Code Section 3344](#) – the California publicity rights statute that has been on the books since 1971. That statute permits living persons to prevent the unauthorized use of their personas (*i.e.*, name, voice, signature, photograph or likeness) "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services." Civil Code § 3344(a).

Though Section 3344 does contain an exemption for uses "in connection with any news, public affairs, or sports broadcast or account, or any political campaign" (§ 3344(d)), it does not include the more explicit and broader exemptions for expressive media found in Civil Code § 3344.1 that provides statutory protection for post-mortem publicity rights in California. Compare Civil Code § 3344.1(a)(2).

One further limitation upon the reach of [Section 3344](#) is that the inclusion of a living person's persona "in a

commercial medium" does not automatically constitute an unauthorized use solely because the usage "is commercial sponsored or contains paid advertising." Rather, the statute makes it "a question of fact" whether the persona usage is so "directly connected" with the commercial sponsorship or paid advertising as to constitute an unauthorized usage. Civil Code § 3344(e).

### Assembly Bill 2480's Proposed Amendments

Now pending in the Assembly Judiciary Committee, [A.B. 2480](#) proposes to make two significant changes to the text of Civil Code [Section 3344](#).

First, it expands the list of activities that require authorization to include the use of "any photograph or likeness of a minor for commercial purposes." This amendment is not tied to such usages on products or for advertising. Instead, the term "commercial purposes" has an entirely different reference point – Civil Code Section [1708.8\(k\)](#), a provision of the anti-paparazzi statute. For its part, Civil Code § 1708.8(k) defines "commercial

purpose" to mean "any act done with the expectation of a sale, financial gain, or other consideration" and which results in the sale, publication or transmittal of an image or sound recording. Accordingly, any disseminated photograph or video of a minor taken by a freelancer, or by anyone regularly employed and paid by a print, broadcast or other electronic media outlet, could conceivably fall within the ambit of this vastly overbroad definition.

By selectively importing just the Section 1708.8(k) definition of "commercial purpose" into Section 3344(a), A.B. 2480 ignores the limitations that other provisions of the anti-paparazzi statute impose upon potential media liability.

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Most significantly, Section 1708.8 applies primarily to physical trespasses or technological trespasses (via telephoto lenses and parabolic microphones) undertaken with the intent to capture images or sounds of individuals engaged in “personal or familial activity” and in a manner that “is offensive to a reasonable person.” Civil Code § 1708.8(a)-(b).

Under A.B. 2480, however, *any* unauthorized use of a minor’s photograph taken by a commercial photographer can become subject to a publicity rights claim – regardless of the circumstances under which the photograph was taken. There is no requirement that the minor have been photographed as the result of a physical or technological trespass. There is no

***Should this legislation be enacted as initially introduced, it could effectively prevent the non-consensual use of any photograph of a minor by any news or entertainment medium. And if passed, it would be a small step indeed to extend the same legislation to photographs or likenesses of adults.***

requirement that the minor have been photographed engaging in any type of “personal or familial activity.” See Civil Code § 1708.8(l) (defining “personal and familial activity” to include “intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of the plaintiff’s private affairs or concerns”). And there is no requirement that the photograph’s manner of capture be “offensive to a reasonable person.”

Perhaps the only media-positive outcome of last year’s amendments to Section 1708.8 was the rewriting of subsection (f) to create a defense that limits potential liability of a prohibited image or sound recording to the “first transaction” and requires “actual knowledge” that the image or sound was captured as the result of a physical or technological trespass or an assault undertaken to provoke same. “Actual knowledge,” in turn, was defined to mean “actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired” the image or sound recording; the plaintiff bears the burden of establishing such knowledge “by clear and convincing evidence.” Civil Code §1708.8(f)(2). Yet this defense is likewise unavailable in an action that could be brought

involving the photograph of a minor under A.B. 2480.

The second major change that would be effected by passage of A.B. 2480 is a blanket declaration that the Section 3344(e) exception discussed above “does not apply to the use of any photograph or likeness of a minor for commercial purposes.” Thus, *any* non-consensual use of a minor’s photograph “in a commercial medium” could be held impermissible if that medium was commercially sponsored or contained paid advertising – a circumstance that exists in virtually every form of print, broadcast or electronic journalism.

### **Potential Ramifications of A.B. 2480’s Passage**

The adverse impact that A.B. 2480 could have upon the print, broadcast and other electronic media cannot be overstated. Should this legislation be enacted as initially introduced, it could effectively prevent the non-consensual use of any photograph of a minor by any news or entertainment medium. And if passed, it would be a small step indeed to extend the same legislation to photographs or likenesses of adults.

Moreover, though the “news, public affairs, or sports broadcast” exception found in Section 3344(d) seemingly remains intact, it is now at war with the “commercial purposes” definition found in Section 1708.8(k) which makes no exception for media that are commercially sponsored or that accept paid advertising. Thus, it is at least theoretically possible to argue that the only “news, public affairs or sports broadcasts” which remain immune for their use of minors’ photographs under A.B. 2480 are those that are not commercially sponsored, that do not contain any advertising and that use only photos taken by uncompensated photographers. Obviously, this would eliminate the statutory protection currently enjoyed by most all expressive visual media – including newspapers, magazines, motion pictures, television and commercial Internet websites.

While it might be appropriate to initially give Assembly Member Bass the benefit of the doubt by suggesting that she did not appreciate the massive damage that A.B. 2480 could inflict upon this nation’s mainstream media, the only appropriate response to these concerns is either a massive and immediate rewriting of this proposed legislation or, better yet, its total abandonment.

*Douglas E. Mirell is a partner in the Los Angeles office of Loeb & Loeb LLP.*



# Senate Hears Testimony On Legislative Solutions To Libel Tourism

**By Laurie A. Babinski and Clarissa K. Pintado**

As college students set their sights on spring break destinations, libel tourists were also planning for trips abroad. However, the potential foreign defamation plaintiffs were not seeking out exotic locales or pristine beaches, but rather plaintiff-friendly jurisdictions where they could pursue claims against U.S. publishers, authors and journalists. But as libel tourists continued their pursuit of easy judgments abroad, Congress continued its own pursuit of strategies to thwart libel tourism and the chilling effect it is having on U.S. authors and journalists who are threatened with foreign defamation actions.

On February 23, the Senate Judiciary Committee held a hearing to examine the importance of federal legislation in curbing libel tourism and to discuss how an effective law could be drafted that would deter libel plaintiffs from taking advantage of foreign defamation laws to suppress the First Amendment rights of U.S. citizens. At the hearing titled “Are Foreign Libel Suits Chilling Americans’ First Amendment Rights?” two witnesses, Kurt Wimmer of Covington & Burling and Bruce Brown of Baker & Hostetler, discussed the impact of libel tourism and a strategy to protect freedom of speech at home.

In his testimony, Mr. Wimmer described the inevitable “chilling effect” that libel tourism has on the “free flow of protected speech.” “It seems clear that the potential for being sued or prosecuted on the basis of an online publication does, in fact, chill the exercise of essential First Amendment freedoms,” Mr. Wimmer wrote in his prepared statement. “This chill can result in self-censorship, in decisions not to publish, and in decisions to review and assess American content based on legal standards that are less protective of free expression than our laws. This chilling effect can undermine the search for truth that our First Amendment demands, in areas that are as essential to our national security as terrorism.”

The chilling effect remains, Mr. Wimmer testified, even though U.S. courts in New York and Maryland have refused to enforce foreign libel judgments that do not comport with constitutional standards. “The very act of rendering a foreign judgment has immediate and damaging effects on the

publisher or author who is sued, before a judgment is ever enforced,” Mr. Wimmer wrote. “The impact of the sword of Damocles is not that it falls, but that it hangs.”

Mr. Brown focused on the potential remedies the Senate should consider when drafting libel tourism legislation. The most essential remedy, Mr. Brown said, is a bar to the recognition of any foreign libel judgment in an enforcement proceeding in the U.S. unless the judgment is consistent with both the Due Process Clause and the First Amendment. Additional relief could also be made available through the creation of a declaratory judgment cause of action that would enable a U.S. citizen sued overseas to seek relief in a U.S. court that a foreign judgment is unenforceable without waiting for a foreign libel plaintiff to move to enforce the judgment, something many foreign plaintiffs never intend to do. Finally, legislation could permit an award of attorneys’ fees and damages as additional means of deterrence.

Mr. Brown also recommended that legislation which includes a separate cause of action should also include a nationwide service-of-process provision as well as a requirement that courts exercise personal jurisdiction to the fullest extent permissible under the Due Process Clause. Such a provision would allow courts to cast their net as wide as possible in attempting to bring foreign libel plaintiffs within their jurisdiction.

The Committee members signaled their understanding of the threat that libel tourism poses for writers, publishers, and news organizations in the U.S., but also acknowledged the fine line that Congress must walk in trying to find a solution. “As much as we might like to, we cannot legislate changes in foreign law to simply eliminate libel tourism,” Chairman Leahy remarked in his opening statement. “But I believe we can all agree that our courts should not become a tool to uphold foreign libel judgments that would undermine our First Amendment or due process rights.”

The witnesses also answered questions from the Senators present, including Sen. Sheldon Whitehouse (D-R.I.), Sen. Al Franken (D-Minn.), Sen. Arlen Specter (D-Pa.) and Sen. Jon Kyl (R-Ariz.), regarding the effect that foreign lawsuits are

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having on U.S. authors and journalists, the scope of potential remedies, and the usefulness of international law in crafting a resolution to the problem.

Sen. Kyl asked if an international treaty or bilateral agreement would provide an avenue for relief. Mr. Wimmer responded that international reform was critical and suggested a focus on the European Union because any judgment rendered in one member state can be enforced in another. Mr. Wimmer also said, however, that a challenge to this strategy is that the laws of the European Union often leave these issues to the member states, and urged the Senate to continue moving forward with its legislation as a first step toward reform.

Two libel tourism bills are currently under consideration in the Senate Judiciary Committee – H.R. 2765, which was introduced by Rep. Steve Cohen (D-Tenn.) and has passed the House of Representatives, and S. 449, which was introduced by Sen. Specter.

A third bill, H.R. 1304, which was introduced by Rep. Peter King (D.-N.Y.) and is identical to S. 449, remains pending in the House. Both H.R. 2765 and S. 449 provide for the non-recognition of foreign judgments if the foreign libel plaintiff seeks to enforce that judgment in a U.S. court. S. 449 goes further by allowing a U.S. citizen to file an action in a U.S. court seeking a declaratory judgment that an overseas judgment is unenforceable and by permitting the recovery of damages in the amount of any foreign judgment in the underlying action.

In addition, treble damages are available under S. 449 if a jury determines by a preponderance of the evidence that the foreign plaintiff “intentionally engaged in a scheme to suppress rights under First Amendment.”

The use of foreign defamation laws against U.S. citizens began in the 1990s but has become more prevalent as the Internet has expanded its reach.

The push for state and federal legislation became more urgent in the wake of Saudi businessman Khalid bin Mahfouz’s London lawsuit against American author Rachel Ehrenfeld, who wrote about Mr. bin Mahfouz’s alleged funding of terrorist activities.

In the past month alone, 95,000 descendents of the prophet Muhammad threatened to sue in England several Danish newspapers that published cartoons depicting the

prophet Muhammad in an unfavorable light. Also this month, Russian oligarch Boris Berezovsky was awarded £150,000 in damages by a U.K. court for allegations that were broadcast on satellite television in the U.K. that he was behind the murder of Alexander Litvinenko, the Russian dissident and former spy who died of polonium poisoning. And a recent ruling by the Federal Court of Justice of Germany found that a German businessman could sue *The New York Times* for libel because 15,000 registered German users of *The Times* website were enough to establish jurisdiction even though the article was not targeted at a German audience.

Legislatures in four states – New York, Illinois, California and Florida – have passed similar libel tourism laws, and bills are under consideration in a handful of others. New York passed the first of the state libel tourism laws, dubbed “Rachel’s Law” after Dr. Ehrenfeld, in May 2008. The law requires the non-recognition of a foreign defamation judgment “unless the court before which the matter is brought

sitting in this state first determines that the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the

United States and New York constitutions.” N.Y. CPLR § 5304.

The New York bill also extended the state’s long-arm statute to call for jurisdiction over any person who obtained a foreign judgment against a resident of New York despite even if the foreign libel plaintiff has no other connections to the state.

The U.K. is a popular destination for libel tourists because its defamation laws are less protective of speech than those in the U.S. Among other legal advantages for libel plaintiffs, the U.K. lacks any equivalent to *New York Times v. Sullivan*, 376 U.S. 254 (1964) that would require public official and public figure plaintiffs to meet a higher evidentiary standard in prosecuting their claims. However, the U.K. has recently taken some modest steps to stem the tide of libel tourism. British MPs have called for legal reform, and on March 24, Justice Minister Jack Straw unveiled a plan to discourage overseas claimants from initiating libel cases in U.K. courts by permitting defendants to plead a “public interest” defense among other protections.

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# Three Significant Commercial Speech Decisions

By Bruce E.H. Johnson and Ambika K. Doran

The Supreme Court and two federal courts of appeals issued important decisions on commercial speech in March. Two relate to attorney advertising—and largely parallel existing law—and a third decides a unique case relating to the advertising of prostitution.

*Milavetz, Gallop & Milavetz v. U.S.*

No. 08-1119, 2010 WL 75761 (Mar. 8, 2010)

In [\*Milavetz\*](#), the Supreme Court reaffirmed its decision in [\*Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio\*](#), 471 U.S. 626 (1985), that compulsory commercial speech such as required disclaimers and the like receive less scrutiny than regular commercial speech regulations. There, the court largely upheld advertising restrictions for “debt relief agencies,” the definition of which includes some attorneys.

The case involved a challenge to certain parts of the Bankruptcy Code added by the Bankruptcy Abuse Prevention and Consumer Protection Act. The Act defines a class of bankruptcy professionals called “debt relief agencies” to include “any person who provides any bankruptcy assistance to an assisted person . . . for . . . payment . . . or who is a bankruptcy petition preparer.” Such agencies may not “advise [e] an assisted person. . . to incur more debt in contemplation of [filing for bankruptcy] . . .” And they must disclose in their advertisements for certain services that the services relate to bankruptcy relief, and identify themselves as debt relief agencies.

A bankruptcy law firm, its president, one of its attorneys, and two clients filed a pre-enforcement lawsuit against the United States, and asked the court to find that the law did not apply to law firms and attorneys and was unconstitutional as applied to attorneys. The Supreme Court found that “debt relief agencies” include attorneys who provide bankruptcy assistance because such assistance includes routine legal services such as providing advice, counsel, and preparing documents. The court upheld all of the restrictions.

The disclosure requirements, the court found, targeted misleading commercial speech and were subject to the less exacting *Zauderer* standard because they did not prohibit any speech, but rather required disclaimers. The *Zauderer* court

found that “an advertiser’s rights are adequately protected so long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” 471 U.S. at 651. In *Milavetz*, the court found the requirements were “reasonably related” to the government’s interest in preventing consumer deception because they required only an accurate statement of the advertiser’s legal status and the character of the assistance provided, and did not limit the advertiser’s ability to add text.

*Alexander v. Cahill*

No. 07-3677, 2010 WL 842711 (2d Cir. Mar. 12, 2010)

In [\*Alexander v. Cahill\*](#), the Second Circuit applied a more restrictive standard to bar enforcement of several disciplinary rules developed by the New York Appellate Division. The rules prohibit client testimonials relating to pending matters, portrayal of judges or fictitious law firms, attention-getting techniques unrelated to attorney competence, and trade names or nicknames that imply the ability to get results. They also establish a 30-day moratorium for targeted solicitation following personal injury incidents.

The plaintiffs, a New York attorney, a law firm, and a public interest group, challenged the rules under the First Amendment. The firm’s commercials had included such colorful tactics as jingles, special effects including wisps of smoke and blue electrical currents, dramatizations, comical scenes, special effects, and used the slogan “heavy hitters.” The Second Circuit found the bulk of the prohibitions were invalid, with the exception of the prohibition on portraying fictitious law firms, and the moratorium.

The court applied the four-part test from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566, (1980). Under the first factor, it found that the prohibitions targeted non-misleading commercial speech, with the exception of the prohibition on fictitious law firms. Under the second factor, it found the government’s asserted interests—to prohibit “inappropriate solicitations . . . potentially misleading ads. . . [and] overly aggressive marketing,” as well as to “ensur[e] that the image of the legal profession is maintained”—were substantial. However, it found the regulations did not meet the third factor because no

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evidence showed that they directly advance those interests. Nor were the prohibitions narrowly tailored: “[T]he categorical nature of New York’s prohibitions would alone be enough to render the prohibitions invalid.”

But the court upheld the 30-day personal injury ad moratorium, largely relying on the Supreme Court’s decision in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), which found constitutional rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims or their relatives for 30 days following the accident or disaster. Although the New York moratorium applied to all forms of communication, the court still found it materially advanced the state’s interest in protecting victims against invasive conduct, avoiding offensive speech in individual homes, and protecting the legal profession’s reputation.

***Coyote Publ’g, Inc. v. Miller***

**No. 2010 WL 816936 (9th Cir. Mar. 11, 2010)**

In a unique case, the Ninth Circuit in [Coyote Publ’g v. Miller](#) upheld a Nevada statute regulating advertising of brothels. The statute banned brothels from advertising in counties where prostitution was illegal, and restricted advertising in places where it was legal, prohibiting it in “any public theater, on the public streets of any city or town, or on any public highway.” In addition, the statute created a presumption that certain information is advertising for purposes of the statute.

Newspaper publishers and a brothel owner filed a lawsuit against Nevada state officials, alleging the provisions were facially unconstitutional. Without much debate, the court upheld the restrictions.

At the outset, it found that because the statute applied to “brothels” and those acting on their behalf, it did not apply to news accounts, meaning the targeted speech was commercial. Applying an intermediate scrutiny test, the court embarked on a lengthy discussion reciting the history of prostitution. It found the state had a substantial state interest in limiting commodification of sex, and that the statute served that interest. In doing so, it reasoned that prostitution is different from other vices because it is historically disfavored, and because the nature of the market in sexual services would never be efficient.

Thus, although the court rejected application of the “vice” doctrine (applying a less restrictive standard to advertising of

so-called vices), it nonetheless rested its finding in part on this similar analysis. In addition, the court found that the advertisements themselves were “commodification,” meaning the prohibition would serve state interest by eliminating commodification itself and by reducing demand for the sale of sex.

In rendering its decision, the court further commented on its limited role in developing policy, stating:

Whether the law ought to treat sex as something, like babies and organs, that is ‘market-inalienable,’ or instead should treat it as equivalent to the sale of physical labor, is a question much contested among legal academics and philosophers. And it may well be that limiting the commodification of human sexuality is in some tension with other ostensible goals of Nevada’s scheme, such as protecting women from being forced into prostitution and empowering them to make choices in the course of selling sexual services. But these questions are not for us to decide. In most cases that we can imagine-slavery, given the Thirteenth Amendment, being an obvious exception-including this one, it belongs to the political branches to fix the boundary between those human interactions governed by market exchange and those not so governed.” (citations omitted).

Appellees have filed a petition for rehearing.

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# Supreme Court Reverses Second Circuit (And 200 Other Cases) And Holds Copyright Registration Mandatory But Not Jurisdictional

By Charles S. Sims

In 2000, in the wake of the Second Circuit's reversal of district judge Sonia Sotomayor's grant of summary judgment for the publishers and databases in litigation filed by freelance author Jonathan Tasini, various groups of freelance authors filed four class action lawsuits, hoping to capitalize on the *Tasini* holding. Five years later, the parties reached a settlement agreement resolving all those claims, which was approved by the district court but vacated by the Second Circuit in 2007, on a jurisdictional ground that the Court raised *sua sponte*. This month the Supreme Court unanimously reversed the Second Circuit and breathed new life into the settlement agreement that had been stymied by the Second Circuit's whim. [\*Reed Elsevier, Inc. v. Muchnick\*](#), reversing *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116 (2d Cir. 2007).

## Background

Beginning in the 1980s, publishers began licensing their periodicals to LexisNexis and similar databases. The complete contents were delivered with representations that they had the right to do so and promises to indemnify the databases against claims for copyright infringement. [\*New York Times Co. v. Tasini\*](#), 533 U.S. 483 (2001), established that the overarching ground on which the publishers had relied for nonexclusive electronic rights, 17 U.S.C. § 201(c) did not grant them that right; but even without that arrow in their quivers any publisher still might well have electronic rights to any given article on a variety of bases, including written licenses, oral licenses, licenses implied by conduct, estoppel or waiver, and others. Notwithstanding the strength of those defenses, fact-intensive litigation involving millions of articles was not an attractive prospect for database companies and publishers. And so when District Judge George Daniels, to whom the post-*Tasini* class actions were assigned by the Judicial Panel on Multidistrict Litigation, asked the parties if they would mediate the freelance claims, they agreed to do so.

The parties jointly engaged Ken Feinberg (a few months

before Attorney General Ashcroft engaged him for the 9/11 compensation project), and mediation commenced. Four years later – after working through the disputes between the plaintiffs and defendants, and then between the databases defendants and publishers over how to fund any settlement – all the parties to the district court litigation reached a settlement that they enthusiastically supported. However, a California attorney whose email address ended in “@classobjector.com” appeared, representing ten cranky authors, and began to file a stream of motions objecting to the settlement and the procedures underway to secure the court's approval.

After the district court rejected all the objections and approved the settlement, it granted the parties' motion for final approval and entered final judgment. The objectors appealed, complaining that unregistered works should be compensated more highly and that authors of unregistered works should have had their own class representative.

At argument, Judge Straub focused nearly exclusively on jurisdiction, and repeatedly asserted his belief that the provision generally requiring registration before institution of infringement claims, 17 U.S.C. § 411(a), comprehensively deprived the district court of jurisdiction to approve any settlement in which the parties compensated authors for works in which copyright had not been registered, even though the consolidated cases had been properly instituted in full compliance with § 411(a). He appeared unmoved by counsel's arguments that all the named plaintiffs *had* registered their works, and by their reliance on authority that courts with properly instituted cases have jurisdiction to settle claims that they lack jurisdiction to try.

Months later, Judges Straub and Winter issued a decision vacating Judge Daniels' judgment approving the settlement, and broadly holding that because the provision requiring registration-before-instituting-suit is “jurisdictional,” district courts may not approve settlements in which unregistered works are compensated. Judge Walker dissented, agreeing that the district court had not exercised jurisdiction to resolve claims for unregistered works, and instead had simply

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approved a private settlement in cases properly before him.

After an unsuccessful petition for rehearing en banc, the settlement parties filed a petition for certiorari, which the petitioners and objectors both urged be granted. After conferencing the petition ten times, the Court granted review, rewriting the question presented to one that the parties had never briefed: whether § 411(a) restricts subject matter jurisdiction. Because the authors and objectors agreed that the district court had jurisdiction to approve the settlement, the Court obtained the necessary adversity by appointing a law professor to represent the Second Circuit's judgment.

Petitioners commenced their work by persuading the Register of Copyright and the Solicitor General to support their position. With that flank covered, and assurance that the Library of Congress and Register would not be arguing that affirmance was necessary to preserve the benefits (to them) of registration, success looked increasingly plausible. Oral argument, delivered on the second day of the term, seemed to go well, and none of the questioning seemed to evidence any substantial support for the Second Circuit's decision.

### The Decision

A year to the day from the cert. grant, Justice Clarence Thomas handed down a unanimous judgment, and an opinion in which five justices fully joined. Justice Ginsburg, for herself and Justices Breyer and Stevens, concurred in the result, differing with the majority only on a minor non-copyright point (whether a particular decision, which the whole Court agreed was not decisive, should be distinguished on a different ground than the ground Justice Thomas's majority adopted).

The Court recognized that it was disagreeing with more than 200 decisions of courts of appeals and lower courts in concluding that registration was mandatory but not a condition to subject matter jurisdiction. But following a recent string of cases in which it had held that various other provisions of law are mandatory but not "jurisdictional", the Court unanimously held that § 411(a), while important and subject to firm enforcement on motion of a defendant, was not a condition precedent to subject matter jurisdiction, which

Congress conferred for copyright infringement cases by 28 U.S.C. § 1338 and 1331. The court relied especially on *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) and its predecessors, which held that statutory claim processing rules or threshold filing conditions are not jurisdictional unless Congress expressly so announces.

Because the Court agreed that *Arbaugh* was controlling, neither the majority opinion nor the concurrence addressed many issues that the parties had briefed, including (a) whether the petitioners would have prevailed even if § 411(a) were jurisdictional, (b) whether district courts may, or must, enforce § 411(a) by dismissal of infringement claims asserted for unregistered works if the defendant does not assert failure to comply with § 411(a) as a defense. (In virtually every infringement case, defendants are quick to assert failure to register where the terms of § 411(a) have not been complied with, and have enormous incentives to do so, so that question will not often arise.)

### Next Steps in In re Literary Works

When the case returns to the Second Circuit 25 days after the decision, the Second Circuit will reactivate the appeal, and presumably ask the parties whether they seek any supplemental briefing or argument. In the meantime, the plaintiffs are making efforts to persuade the objectors – who have already delayed payments to the authors by nearly four years – to withdraw their appeal. Once the appeal is concluded, one way or the other, if the settlement survives the parties will proceed to implement it.

The settlement agreement affords publishers the right to review asserted claims. They may well find it expedient to exercise that right, particularly as to those freelance authors who have submitted claims (for hundreds of works) that total in the five or six figures. The claims administrator reports that claims have been lodged for over 300,000 subject works, for an initial value (which may be reduced by claim review) of over \$8 million.

### Impact on Copyright Infringement Litigation

The principal impact of the Court's decision on copyright infringement cases generally is modest: henceforward,

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***While the decision does seem to afford defendants protection from infringement suits where § 411(a) hasn't been complied with, it also affords defendants the option of reaching a class-wide settlement, if they want to go down that path.***



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motions to dismiss for lack of registration should be labeled as motions lodged under Rule 12(b)(6), rather than Rule 12(b)(1). But those motions will be granted if the complaint seeks to litigate over unregistered works. Nothing in the decision suggests that defendants are now exposed to having to litigate infringement cases for unregistered works.

While the Court's decision is short and it did not explore the ramifications of its holding, nothing in the decision suggests registration is not mandatory, or that a district court has any discretion whatsoever when a defendant moves to dismiss for failure to register a claim consistent with § 411(a). The brief for the United States makes that point strongly, as did petitioners' briefs; and the opinions by Justice Thomas and Justice Ginsburg contain no hints at all that § 411(a) is not mandatorily enforceable on defendant's timely motion. Section 411(a) means what it says and is fully enforceable by a defendant who chooses to invoke it.

While the decision does seem to afford defendants protection from infringement suits where § 411(a) hasn't been complied with, it also affords defendants the option of reaching a class-wide settlement, *if they want to go down that path*. The Court's decision does not entirely exclude the possibility that a district court might have the discretion, or even the obligation, to dismiss for failure to comply with § 411(a) in any event – that was a question Justice Thomas's decision leaves open – courts will most likely read *Reed Elsevier* to make § 411(a) enforceable but generally waivable at defendants' option.

The circumstances in which defendants would want to waive are almost certainly sufficiently few and constrained so that the public benefits secured by § 411(a) are unlikely to be significantly lost by giving users and owners, collectively, the means to resolve longstanding, intractable problems with class action settlements. Notably, the plaintiff's § 411(a)-derived inability to litigate over unregistered works on a class basis should go far to preventing the class action vehicle from being used extortionately, as is so often the case in other areas of the law.

Finally, the decision likely will permit declaratory actions for non-infringement notwithstanding the defendant's refusal to register a work asserted to be protected and infringed, contrary to such decisions as *Stuart Weitzman LLC v. Microcomputer Resources Inc.*, 542 F.3d 859 (11th Cir. 2008) (dismissing declaratory judgment claim on unregistered United States work on subject matter jurisdiction

ground).

In short, the Supreme Court seems to have reached a highly useful result, paving the way for approval of the *Literary Works* settlement, and generally handing parties the opportunity to resolve broad scale infringement disputes on a class basis, if the defendants seek that kind of resolution.

*Charles S. Sims, a partner with Proskauer Rose LLP, argued the case for petitioners before the Supreme Court. Professor Deborah Jones Merritt argued the cause for amicus curiae in support of the judgment below (appointed by the Court).*



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# Court of Appeals for the Federal Circuit to Postal Service: “Lick That!”

## *Reverses Fair Use Finding, Despite Dissent*

By Toby Butterfield

When the United States government spends millions of dollars to commission a war memorial, one might assume it retains the right to put an image of a sculpture in that memorial on postage stamps honoring the war's veterans. But things were not that simple in a recent decision resolving a long dispute between the United States government and sculptor Frank Gaylord. The Court of Appeals for the Federal Circuit held that the use of a photograph of the Korean War Veterans Memorial on a commemorative stamp was not a fair use. [\*Gaylord v. United States\*](#), No. 2009-5044, 2010 WL 653272 (Fed. Cir. Feb. 25, 2010), reversing [95 Fed. Cl. 59](#) (Ct. Claims 2008).

The Army Corps of Engineers arranged for the Government to control all copyrights in the memorial, but its contractor Cooper-Lecky Architects swiftly found itself in a dispute with Gaylord, the artist it commissioned to sculpt a series of statues for the memorial. Cooper-Lecky eventually settled its dispute with Gaylord by acceding (over strenuous objections by the Army

Corps of Engineers) to Gaylord's assertion of copyright ownership in the statutes. The Postal Service obtained a license from a photographer to create a stamp from his photograph of the statutes, only to learn that Gaylord maintained that the photographer had no right to do so. Since Gaylord's copyright ownership was not on appeal, the Federal Circuit decision centered on a rejection the government's fair use defense.

The Federal Circuit's analysis of the “purpose and character of the use” shows that court to be less willing than the Second Circuit to accept a copyright defendant's assertion that he made fair use of a copyrighted work because he was commenting upon it.

### Background

In 1986, Congress enacted legislation to create a Korean War veterans memorial. The Government, via the American Battle Monuments Commission and the Army Corps of Engineers, selected Cooper-Lecky Architects as the prime contractor for the memorial, and Cooper-Lecky in turn sponsored a competition to select a sculptor. Frank Gaylord won that competition, and was paid \$775,000 to complete the sculpture, which he did between 1990 and 1995, with some suggestion and criticism from Cooper-Lecky, the Korean War Veterans Memorial Advisory Board and the Commission on Fine Arts. Gaylord did not construct the sculpture himself, but he created



The John Alli photograph used for the stamp.

models of 19 soldiers standing in formation, which Cooper-Lecky cast into the stainless steel statutes which came to be known as “The Column.”

Copyright ownership in the sculpture became a thorny issue. While the prime contract between the Army Corps and Cooper-Lecky provided that the Government would hold all copyrights in all resulting work, in January, 1993, Cooper-

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Lecky signed a subcontract with Gaylord omitting that provision and stating that copyright ownership was to be determined.

Starting in 1993, Gaylord applied for and obtained copyright registrations for “The Column,” and in January, 1994, Cooper-Lecky and Gaylord amended their agreement to say that Gaylord would own the copyright. The Government disputed Gaylord’s copyright from the beginning, but according to the trial court opinion, the American Battle Monuments Commission withdrew its copyright claims in May, 1994. In February, 1995, Gaylord agreed Cooper-Lecky could license “The Column,” but terminated that agreement as well as his prior agreement with Cooper-Lecky later that year following a licensing dispute.

Subsequently, an amateur photographer’s photograph taken at the memorial focusing on “The Column” under snow gained much publicity. Gaylord ultimately licensed the photographer to exploit the photograph, receiving royalties under their separate agreement. The photographer agreed to license his photograph to the US Postal Service for use on a stamp, and paid Gaylord the agreed licensing fee. Gaylord nevertheless sued the USPS, claiming that the photographer’s license to the USPS provided rights to reproduce the photograph, but not the sculpture depicted in it.

The trial court accepted Gaylord’s copyright registrations as *prima facie* evidence of Gaylord’s ownership, but for reasons not made clear in its decision, did not further address the possibility that the Government, rather than Gaylord, should have been the sole copyright holder. Further, it rejected arguments that the Government was a joint author of “The Column” based on its guidance, suggestion and criticism while Gaylord developed his models of what would become the statues. Instead, the trial court credited the Government’s argument that the stamp made fair use of “The Column.” The Federal Circuit reversed that conclusion,

prompting a strenuous dissent from the Second Circuit’s Judge Newman, sitting by designation.

### Fair Use Analysis

The Federal Circuit’s opinion is a good reminder that the four “nonexclusive” fair use factors are used as an overall balancing test where no single factor is consistently dispositive. Here, the Federal Circuit was convinced that the first three factors – “purpose and nature of use,” “nature of the copyrighted work,” and “amount and substantiality of the portion used in relation to the copyright work as a whole,” weighed sufficiently in Gaylord’s favor that it didn’t matter that the stamp had no market impact on Gaylord’s copyrighted work.



**The United Postal Service Stamp.**

### Purpose and Character

of Use: Courts often seem to consider multiple sub-factors within this first fair-use factor, and here the Federal Circuit focused at the expressive purpose of the stamp, the extent to which it transformed the original work, and the extent to which the work had a commercial purpose.

The Court first reasoned that the stamp had the same purpose as the original sculpture – to honor the veterans of the Korean War.

The court contrasted the situation with the one in *Blanch v. Koons*, 467 F.3d 244 (2d. Cir. 2006) in which the Second Circuit accepted artist Jeff Koons’ declaration stating that he intended to transform the purpose of a fashion photograph by incorporating it into a painting, thus commenting on such images in consumer culture and media.

The Court also did not believe that the use of the photograph on the stamp was “transformative” of the original sculpture because of aesthetic elements the photographer added to his photograph. The image on the stamp featured only part of the column of the soldiers, was taken in the snow and used subdued lighting and a monochromatic feel. But the

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court rejected the argument that these factors constituted a transformation of the work by creating a “surrealistic environment... where the viewer is left unsure whether he is viewing a photograph or statues of actual human beings.” That surreal quality was contributed largely by the sculpture itself, the court reasoned.

In a moment that may be destined for copyright infamy, Judge Moore quipped that “nature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude.” The analysis emphasizes that it is the end users intent, not the intervening artist’s, which a court will analyze. The court might have ruled differently had the defendant been the photographer, who undeniably used his own artistic efforts to create the photograph, rather than the Postal Service, which merely licensed it and printed it on its stamp.

The court also found that the stamp – which generated \$17 million in sales – was a commercial use rather than an educational or non-profit use, notwithstanding the fact that sales by the United States Postal Service raised revenue only for the Government. In contrast, in *Blanch v. Koons*, the Second Circuit ruled that Koons’s painting did *not* have a commercial purpose, although a large bank corporation had commissioned it.

**Nature of the Copyrighted Work:** The Federal Circuit found that Gaylord’s sculpture was clearly a creative work, noting that under the test from *Campbell v. Acuff-Rose Music*, 510 U.S. 569, more leeway is given for fair use of a factual or informational work than for a creative work. Further, the fact that The Column is “part of a national monument—perhaps the epitome of a published work,” *Gaylord* at \*6, was not enough to tip the balance toward fair use.

**Amount and Substantiality of the Portion Used:** The trial court had found that while the stamp depicted 14 of the 19 soldiers in “The Column,” a substantial portion of the work, the substantial use was mitigated by the ways the stamp transformed the expression of the work and by the resulting lessened importance of the work to the purpose of the stamp. The Federal Circuit rejected this reasoning; having found that the stamp was not sufficiently transformative for fair use, it also disagreed that sculpture had any reduced importance to the stamp. “The Column constitutes the focus — essentially the entire subject matter — of the stamp . . . Although the snow and muted coloring lessen the features of the solid sculpture, the stamp clearly depicts an image of The Column.” *Gaylord* at \* 6. This, the court said, weighed

against fair use.

**Market Impact:** The Federal Circuit agreed with the trial court that the stamp had effectively no negative impact on either the value of The Column – which it may even have increased – or the market for derivative works. Thus the Court implicitly made clear that market impact is unnecessary to a finding against fair use.

### Judge Newman’s Dissent

Judge Newman’s dissenting opinion argues that Gaylord did not have the right to sue the federal government, as its contract with Cooper-Lecky should have been resolved to give the Government and not Gaylord copyright in the work. Judge Newman reasoned that Gaylord’s suit was barred both by the statute under which Gaylord brought the suit, 17 U.S.C. §1498(b) and by another statute which provides that those working in the service of the U.S. Government, whether or not employees, do not acquire rights in the result of their work.

The majority opinion does not decide how the Copyright Act could grant Gaylord rights in his work despite the contradictory provisions of another federal statute. The majority said they did not address these issues because they were not raised on appeal. The result, Judge Newman says, “unreasonably and unfairly impacts the end users of the Memorial” and “produces a chilling effect on the public’s ability to use the Memorial as intended.”

### Conclusion

It seems ironic at least that after paying to create and providing by contract that no one else would own any copyright in the public memorial, the United States Government was reduced to arguing that its use of a licensed photograph of it was a fair use. The court’s conclusion, and the indemnity obligations that photographers may face as a result, is a cautionary tale that no licensee should merely accept that a licensor truly has the right to license all the rights they purport to grant.

Anyone reproducing photographs taken in public places can not assume that portrayal of publicly commissioned art is protected by fair use. As Judge Newman wrote in dissent, this decision will have a chilling effect on the right of both amateur and professional photographers to reproduce their photographs, even when they depict national monuments.



## Second Circuit Holds that the Fed Must Disclose Borrowers and Loan Terms

The Second Circuit this month affirmed that FOIA requires the Board of Governors of the Federal Reserve System to disclose the names and terms of loans to private financial institutions who borrowed money from the Fed under its emergency loan programs in response to the financial crisis. [\*Bloomberg L.P. v. Board of Governors of the Federal Reserve System\*](#), No. 09-4083 (2d Cir. March 19, 2010) (Jacobs, Leval, Hall, JJ.), *affirming*, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (Preska, J.). The Second Circuit rejected the Board's argument that the information was covered by FOIA's Exemption 4, which protects "privileged or confidential" financial information submitted by a "person" which is defined to mean a person or entity other than an agency.

In response to the recent financial crisis, the Fed significantly increased the amount of public money it lends to private financial institutions. Before the crisis, during the week ending August 8, 2007, the average outstanding loan balance through the Fed's discount window was approximately \$1 million. During the week ending October 8, 2008, after changes to the Fed's loan programs, the average outstanding loan balance increased to more than \$400 billion. While the Fed disclosed the aggregate loan amounts, it kept the terms of each loan, including the name of the borrower and the collateral, secret. In an effort to lift the Fed's veil of secrecy, on May 20, 2008, Bloomberg News submitted to the Board a FOIA request for records that would reveal, on a loan-by-loan basis, the name of the borrower, the amount and duration of the loan, and the collateral for the loan. FOIA required the Board to respond by June 18, 2008. On November 7, 2008, still awaiting a response from the Board, Bloomberg sued for access to the records.

In a letter dated December 9, 2008, the Board informed Bloomberg that it was withholding 231 pages of reports that summarized the terms of the loans. The Board asserted that the records were exempt from disclosure under FOIA Exemptions 4 and 5 and that any records with the Federal Reserve Bank of New York were not covered by the request or subject to FOIA. The Board maintained that position before the District Court.

Following cross-motions for summary judgment, the District Court ruled that the reports were not exempt from disclosure and that certain New York Fed records must be searched. In doing so, the District Court held that the documents were not obtained by a "person," but rather reflected governmental activity. The District Court also ruled that the Board had failed to satisfy its burden of proving that disclosure would cause competitive harm to the borrowers.

The Board, together with The Clearing House Association L.L.C. (an association of banks that intervened after the District Court's decision), appealed to the Second Circuit, contending that Exemption 4 protects the records from disclosure. On appeal, the Board relied on three primary arguments. First, it argued that the requested information was not a record of governmental activity but rather was information obtained from "person;" i.e., the borrowers. Second, the Board contended that the information was confidential because its disclosure would stigmatize the borrowers and harm their competitive positions. Third, the Board argued that under the so-called "program effectiveness test," the documents should be shielded from disclosure because release would impair the Board's ability to discharge its statutory mandate to effect monetary policy. In affirming the District Court order, the Second Circuit agreed with Bloomberg that the information in question was not obtained by a person but rather constituted a record of governmental activity. In that regard, the Court held: "The only information sought is a summary report of actions that were taken by the government. And it cannot be said that the government 'obtained' information as to its own acts and doings from external sources or persons."

In addition, the Court declined to adopt the "program effectiveness" test, concluding that the addition of a new FOIA exemption should come from Congress, not the courts: "The statute as written by Congress sets forth no basis for the exemption the Board asks us to read into it. If the Board believes such an exemption would better serve the national interest, it should ask Congress to amend the statute."

The Fed must now choose between producing the records and seeking either a rehearing before the Second Circuit or review by the Supreme Court.

# Florida Courts Crawl Toward The Digital Age

By Carol LoCicero

On March 18, 2010, the Florida Supreme Court issued an opinion adopting a new court rule governing access to court records. [\*In re Amendments to Florida Rule of Judicial Administration 2.420\*](#), No. 07-2050, 2010 WL 958075 (Fla. March 18, 2010).

The rule impacts all categories of records – civil, criminal and appellate. The rule was first amended in 2007 to address problems with super sealed cases (where hundreds of court files were sealed and the existence of the cases wiped from the docket). The most recent rule revisions are an outgrowth of the Court's effort to permit electronic access to imaged court records via Clerk web sites.

In 2002, The Court issued a moratorium on online access to court records, shutting down a number of web sites operated by Clerks that were providing public access to court records. Adoption of the revised rule is a “step closer to providing the public electronic access to court records by providing a mechanism that will allow clerks of court to more readily identify confidential information that must be screened from public view.” *Id.* at \*5.

Here's how Rule of Judicial Administration 2.420 will work generally:

First, the rule lists 19 categories of records that are automatically closed by statute, including adoption files, juvenile court records, commitment proceeding records and probate inventories. There is also an exemption for Social Security numbers. Filers bear the obligation of notifying Clerk's Offices that records within this list are being filed. The Court adopted a notification form. Non-parties are to be notified whenever a record is filed under seal that contains information involving them.

Otherwise, whenever closure is sought for records outside the listed records, a motion must be filed. Rule 2.420 adopts the same motion procedure for most civil, criminal and appellate records. A Motion to Determine Confidentiality of Court Records must be filed and docketed. Unless the parties agree to closure, a hearing must occur (except in the rare cases involving appellate records). The Court has discretion to hold a hearing, even if the parties agree to closure.

Journalists following cases should review the case docket periodically to ensure that no closure motions have been

filed. If any have, the journalist should notify its counsel so that the motion can be opposed, if desired.

The Rule basically codifies closure standards in Florida case law. It also specifies the findings the Court must make prior to closure and what provisions any closure order must contain.

Once an order is entered, it must be posted for at least 30 days. Florida clerks are already posting these orders online and at the courthouse in civil matters. Again, it is important that journalists – particularly those routinely covering the courts – know where clerks in their coverage areas are posting closure orders so that the journalist can review any closure orders entered on a routine basis.

For limited categories of criminal records, a restricted motion practice has been created. The restricted motion procedure can be used whenever there is a request to determine the confidentiality of criminal court records that pertain to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information. There will be only a limited docket entry of a “motion.” The actual motion to close will be sealed.

Journalists must pay particularly close attention to the docket in criminal matters and inquire about docket entries involving “motions” if they suspect a defendant is entering into a plea agreement which requires the defendant to provide evidence to the State.

To address super sealer concerns, the Rule continues to require at least a Case No. to reveal the existence of a case so that no cases completely disappear from the public docket.

These are some of the highlights of Rule 2.420. The rule is quite lengthy and can be confusing. The procedures for determining confidentiality of court records do not go into effect until October 1, 2010.

Only time will tell if the rule helps to correct problems – or engenders more closure motions. As of yet, there is no timetable for statewide electronic access to court records. A pilot program is currently underway in Manatee County, where court records are available publicly via Clerk Chips Shore's website at [www.manateeclerk.com](http://www.manateeclerk.com).

*Carol LoCicero, a partner at Thomas & LoCicero PL in Tampa, Florida, represented a consortium of news organizations in the rule proceedings.*



# Update: Permanent Injunction Entered Requiring Same-Day Access To Civil Court Filings *Awards \$250,000 Attorneys' Fees*

**By Rachel Matteo-Boehm and Katherine Keating**

Capping off a resounding victory for timely access to court records in an era where many state and federal courts are increasingly asking the media to wait to review new records until they are posted online, the District Court for the Southern District of Texas entered an agreed permanent injunction and final judgment in favor of Courthouse News Service, ordering that the Harris County District Clerk's Office provide same-day access to case-initiating documents filed in most civil cases.

Courthouse News, a nationwide legal news service for lawyers and the news media, had been sending reporters to the Harris County Civil District Courts on a daily basis for almost ten years to review and report on new case-initiating civil petitions at the end of the day on which those petitions were filed. In early 2009, newly elected Harris County District Court Clerk Loren Jackson instituted a policy under which civil filings could be accessed only through the Clerk's web site. Reporters were no longer permitted to review petitions in paper form at the courthouse. Most filings, however, were not available on the Clerk's web site until two to five court days after filing.

After Courthouse News' efforts to resolve the issues by working with Clerk Jackson and other court officials proved unsuccessful, Courthouse News filed an action in the U.S. District Court for the Southern District of Texas under 42 U.S.C. § 1983 against the clerk and his chief deputy in their official capacities. Courthouse News' action alleged that the two-to-five day delay in access to court records amounted to a complete denial of access and thus violated both the First Amendment and common law right of access, as well as violations of Texas' constitution and statutes.

In July 2009, the Judge Melinda Harmon issued a preliminary injunction ordering restoration of same-day access. *Courthouse News Service v. Jackson*, Civil No. 09-CV-01844, 2009 LEXIS 62300 (S.D. Tex. July 20, 2009). In her preliminary injunction order, Judge Harmon recognized that "[t]here is an important First Amendment interest in providing timely access to new case-initiating documents" and rejected the argument that delays in access were justified

by the clerk's asserted need to fully process new case-initiating documents before allowing the media to review them, finding that "the 24 to 72 hour delay in access is effectively a denial of access and is, therefore, unconstitutional." *Id.* at \*11, 14. See *Texas Clerk Required to Provide Same Day Access To Civil Court Filings Under First Amendment*, MLRC MediaLawLetter, July 2009, at 40. Following Courthouse News' posting of the \$1,000 bond mandated by the Court, the Clerk's Office began providing same-day access to new petitions, in accordance with the preliminary injunction order.

Two months later, in October 2009, defendants moved to dismiss the action on the grounds that since the Clerk's Office was complying with the preliminary injunction and same-day access had been restored, the matter was now moot. Following a hearing in December 2009, Judge Harmon rejected this argument, agreeing with Courthouse News that "the violation of its and the public's right of access to newly filed case-initiating documents under the First Amendment of the United States Constitution ... is 'capable of repetition, yet evading review,'" and that even the voluntary cessation of allegedly illegal conduct does not deprive a tribunal of the power to hear and determine a case, especially where there is nothing to stop the defendant from reverting to its old behavior.

In her December 18, 2009 written order denying the motion to dismiss, Judge Harmon observed:

The cessation of the delay by Defendants in providing first-day access to the public was far from voluntary, as evidenced by testimony at the preliminary injunction hearing. Moreover it was effected only in response to this Court's Order of Preliminary Injunction, as Defendants have conceded in their motion and again during the hearing. The Court finds that Defendants have failed to show when delays could not "reasonably" be expected to recur, no less demonstrate that such is "absolutely clear." Their

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attitude toward curing the alleged obstruction during negotiations with Plaintiff and throughout this litigation can at best be described as indifferent, irresponsible, and even recalcitrant.

*Courthouse News Service v. Jackson*, 2009 LEXIS 118351, at \*2-3 (S.D. Tex. Dec. 18, 2009).

Shortly thereafter, defendants agreed to the entry of a stipulated permanent injunction – something that Judge Harmon herself had suggested near the end of the hearing on the motion to dismiss. Under an Agreed Permanent

Injunction and Final Judgment entered by the Court on March 2, 2010, the Clerk and his agents are permanently enjoined from denying Courthouse News same-day access to case-initiating documents filed in civil cases, except in certain limited circumstances (such as when a petition has been properly filed under seal, a petition seeks a TRO or other similar immediate relief, or when the Clerk's office is closed for business due to a true emergency).

The court also found Courthouse News to be the prevailing party for the purposes of an award of attorneys fees under 42 U.S.C. § 1988 and ordered defendants to pay Courthouse News' attorneys fees of more than \$250,000.

## **MLRC Joins Media Amicus Brief to European Court in Max Mosley Privacy Case** *Opposes Claim that Media Must Give Prior Notice to Subjects of Articles*

MLRC has joined many of Europe's leading newspaper publishers and anti-censorship groups to urge the European Court of Human Rights to reject the claim that journalists should be required by law to give at least 2 days notice of their intention to expose the misbehavior of a public figure so that their potential victim can go to court to obtain an injunction to stop the publication.

In 2008, Max Mosley, then President of the International Racing Federation, won a high profile lawsuit against the News of the World tabloid for breach of confidence and unauthorized disclosure of personal information. The newspaper learned that Mosley was a regular participant in sado-masochism sessions with prostitutes and focused on what appeared to be Nazi overtones of the sessions. That angle was particularly interesting given that Mosley's father, Oswald Mosley, was a leading British Fascist and Hitler supporter in the 1930s. The articles were accompanied by video clips from the sessions that had been secretly recorded by one of the female participants. For full background see "Max Mosley Wins Privacy Case Against Tabloid: F1 Boss Has Sick Orgy With 5 Hookers - But Not, As It Turns Out, A Nazi Orgy," MediaLawLetter Aug. 2008 at 25.

Following his successful lawsuit against the News of the World, Mosley filed a complaint with the European Court of Human Rights. The gist of his complaint is that the UK is in breach of its Article 8 requirement to respect private life because there is no positive requirement on the press to notify subjects prior to publication of an alleged disclosure of private information so that the subject can seek to obtain an injunction against publication.

The European Court of Human Rights found that the complaint was admissible and decided to fast-track it for a hearing. If it is upheld, the UK will be obliged to pass a new law that requires newspaper to submit their articles to those they intend to expose in time for them to obtain an injunction. Free expression advocates consider Mosley's claim to be the most *serious threat to press freedom in Europe*.

Among the most notable points in the brief, written by distinguished free-speech advocate Geoffrey Robertson QC, is the historical background to the European Convention on Human Rights. Robertson points out that when the European Convention was settled in 1950, all States voted to exclude "reputation" from the definition of privacy but European judges have recently reversed this decision, without explanation, by deciding that under the privacy law, public figures can protect their reputation by suppressing true facts about themselves. This has enabled them to circumvent the law of libel, where truth is always a defense.

The full brief follows on the next page.

## IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 48009/08  
Mosley v United Kingdom

WRITTEN COMMENTS OF  
Media Legal Defence Initiative  
Index on Censorship

The International Media Lawyers' Association  
European Publishers' Council  
The Mass Media Defence Centre  
Romanian Helsinki Committee  
The Bulgarian Access to Information Programme (A.I.P.) Foundation  
Global Witness  
Media Law Resource Center

Pursuant to leave granted on 1 February 2010 by the President of the Grand Chamber under Rule 44(2) of the Rules of the Court, the above named organisations hereby submit written comments on the principles involved in the solution to the case, as identified in the 'questions to the parties' on 22 October 2009.

## INTRODUCTION

***I believe that newsworthiness is a firm realisation of the fact that there's nothing so much the average Englishman enjoys on a Sunday morning - particularly a Sunday morning - as to read a bit of dirt.***

- Sir Melford Stevenson QC, High Court judge in *The Bounds of Freedom* (Constable, 1980), page 34.

The interveners represent a wide range of media organisations, operating in the UK and throughout Europe, and public interest organisations concerned that the legal system should not impede the publication of the truth in relation to any matter of public interest. The Claimant is a wealthy international public figure with a penchant for satisfying his sexual desires by beating women, and being beaten by them. He pays prostitutes to engage with him in mildly sado-masochistic orgies, and campaigns for a law that will enable the truth about such 'private' conduct to remain secret, namely a statutory requirement to give advance notice several days before anyone's privacy is (even arguably) infringed so that an injunction can be obtained banning publication.

Interveners point out (as does a recent UK Parliamentary Committee) that any such advance notice requirement on the media would be a serious incursion on freedom of expression guaranteed by Article 10. In these proceedings, however, the Respondent called upon to defend free speech is, under the procedural rules, none other than the United Kingdom, which has been demonstrated to be amongst the worst violators of free speech in Europe. The cases in which the UK government has been found to have breached Article 10 are numerous, from *Golder v United Kingdom*<sup>1</sup> and *Sunday Times v United Kingdom*<sup>2</sup> through to *Observer and Guardian v United Kingdom*,<sup>3</sup> *Hashman and Harrop v United Kingdom*,<sup>4</sup> *Silver v United Kingdom*,<sup>5</sup> *Steel and Morris v United Kingdom*,<sup>6</sup> *Bowman v United Kingdom*,<sup>7</sup> *Financial Times v. United Kingdom*,<sup>8</sup> etc, etc. – a list of cases that extends throughout the years until the present day. In such cases, the Respondent government has been shown to have breached Article 10 principles, and indeed it is generally recognised by the media as an enemy of free speech. For example, the United Nations Human Rights Committee, in its most recent 'Concluding Observations' on UK compliance with the UN Covenant on Civil and Political Rights, singled out Britain's libel laws as having '*served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to*

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*publish their work*’ and noted that with the advent of the internet the UK’s ‘*unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.*’<sup>9</sup> So it is obviously unsatisfactory to have the main case against an important new and unique restriction on the media argued by a party in which the media and civil society itself has no confidence, in written submissions that have not been shown to the media for comment and in oral submissions to which the media cannot reply. Whilst this unsatisfactory and unfair position may be the result of the procedural rules, it can only be ameliorated by inviting the media and civil society: to file comments on the final submissions of the UK government; and to appear at any hearing and to make an oral submission. These interveners respectfully request such an invitation from the Court.

### **The Root Problem: This Court’s illegitimate importation of ‘honour and reputation’ into Article 8**

Article 10(1) guarantees free expression, including the right to impart information, subject to a number of Article 10(2) exceptions prescribed by law and necessary in a democratic society for (*inter alia*) ‘the protection of the reputation and rights of others’. It was, until recently, settled law that Article 10(1) creates a presumption in favour of free speech, defeasible only in response to a pressing social need for the protection of reputation, an exception that must be ‘strictly construed’ and convincingly established. There is no ‘balance’ between Article 10(1) freedom and Article 10(2) reputation — the latter is amongst ‘a number of exceptions which must be strictly interpreted’.<sup>10</sup> This is a clear approach to Article 10 interpretation, precise enough for the media, its readers and its potential complainants to understand. Free speech is guaranteed (yes, guaranteed) unless it is necessary to restrain or punish its exercise because it damages a reputation. Since the ‘reputation’ that overrides free speech must be a true reputation, it cannot be damaged by the publication of truthful information. The ‘reputation’ protected as a subsidiary right under Article 10(2) is the right to stop, or to receive compensation for the publication of, falsehoods.

Otherwise, outside the framework of Article 10, publication of truth can only be restrained as the result of a ‘balance’ with another primary guarantee e.g. fair trial (Article 6 — not relevant here) or Article 8, which calls for ‘respect for his private and family life, his home and his correspondence’. Interestingly, Article 8 itself makes no exception for the right to freedom of expression — an indication that the framers did not intend it to be ‘balanced’ with Article 10, other than in respect of a class of publications that interfere disrespectfully with private, home and family life. It is only in this comparatively narrow area that a ‘balance’ is the appropriate legal mechanism: where the strength of the competing public interest are compared, there will be cases where one’s home and family life must be respected and the press can be stopped, for example, from providing intimate personal details or disclosing personal matters concerning children. In relation to such publications which have no countervailing public interest, injunctions and compensatory damages are entirely in order, as would be a condign penalty, for example, indemnity costs or aggravated damages — where notice of a gross privacy invasion was not given.

This simple and straightforward position was thrown into turmoil in a series of decisions that imported ‘honour and reputation’ as protected rights under Article 8. This development is both astonishing and illegitimate, as it is well known that at the drafting meetings in 1950 an attempt was made to insert ‘honour and reputation’ into Article 8, but was resoundingly rejected by the high contracting parties.<sup>11</sup> As a result of the founding states’ deliberate decision, ‘reputation’ is not protected as an Article 8 right to be advanced against the presumption in Article 10(1). However, quite incredibly, beginning with several cases from France (*Radio France* and *Chauvy*) the Court has simply stated that Article 8 protects ‘reputation’, without giving any reason for this departure from historical fact, and of course courts in the UK and elsewhere have followed, making the same assumption without investigating its validity. It is our respectful opinion that because ‘reputation’ was deliberately rejected as an Article 8 right in the *travaux préparatoires*, it was intellectually irresponsible for the Court to smuggle it back into Article 8, without explanation or reasoning. In *Radio France*,<sup>12</sup> the Court said no more than it was ‘an element of Article 8’ and in *Chauvy*<sup>13</sup> it said that reputation was ‘part of the right to respect for family life’ (which it plainly is not). These cases are juristically unacceptable: judges have no right to twist or distort the law that they apply, to protect rights that they know were specifically excluded from the law at the time it was framed and agreed. The discretion allowed to judges to ‘develop’

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the law is not vouchsafed for them to develop it so as fundamentally to contradict the deliberate intention of the law-makers. 'Reputation' is protected under Article 10(2), under the mechanism as stated by that article, but has no place in Article 8.

There was some dawning recognition of this fact in *Karako v Hungary*,<sup>14</sup> where the correct suggestion is made that libel — an attack on character — should be dealt with entirely under Article 10, not Article 8. This was certainly the intention of the framers of the European Convention on Human Rights, and of the full European Court in the *Sunday Times* decision. It would leave a narrow list of matters to be subject to the 'notice requirement' sought by this application. However, the acceptance by this court (for example, in *Pfeifer v Austria*<sup>15</sup>) that 'a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity' makes the notice requirement sought in this case quite unacceptably broad. It would mean that the media would be obliged to give several days' notice of any criticism of a public figure, however 'public' the context of the debate, which could upset such nebulous but ego-centric concepts as 'personal identity' and 'psychological integrity', especially if such criticisms are true.

What the Claimant in this case wants is for Courts to shield by pre-publication injunction important people like himself from criticism based on facts that are true. This would be a massively disproportionate result in the UK because of the rule against prior restraint (see below), which prevents any injunctive restraint on the dissemination of information alleged to be untrue, where the publisher indicates an intention to defend.

### **Consequences of Prior Notification: Banning or Delaying Perishable News**

The fact that the notice requirement for the potential breach of Article 8 would apply wherever reputation is in issue, even in public debate involving public figures, would delay publication of important news — a very perishable commodity — in a wide range of public interest situations and wherever the public figure could claim his or her 'psychological integrity' was at stake from publication of the truth — for example, that he had sex with sheep, or did not pay his taxes, or practiced black magic, or beat up his girlfriend or sold arms in the breach of UN sanctions. This would be an absurd restriction, yet it is a consequence of the Complainant's case. Of course, having stalled publication for 48 hours, the public figure (which could be a multinational corporation claiming that its integrity was at stake<sup>16</sup>) would hire lawyers to apply to a judge to claim that the psychological impact of the Article 8 violation by themselves or on members of their family would outweigh the public interest inherent in learning of their exploits with sheep or tax avoidance or whatever.

The judge would probably continue the injunction for a week (this is the usual practice) until there was time for a full hearing — so that is another week in which the Article 10 right to publish is suspended. Then a day would be set aside for a hearing to see whether the Claimant has a case that might succeed at trial. It will not be a full hearing, but will be decided on affidavits by people who may later fear to turn up at trial or may later have to accept they are mistaken. A full day hearing at the High Court will cost the media defendant up to £60,000 if it loses and about £10,000 if it wins. This, of course, is the 'chilling effect' of a notice requirement: newspapers will not bother to publish newsworthy stories of genuine public importance for which they must give notice because they know that giving notice will trigger expensive attempts to stop the story.

### **Failure to define 'respect for privacy'**

Further uncertainty - so much that the 'prescribed by law' requirement is breached — is provided by the failure of this Court and of UK judges to give any sensible or coherent definition to the concept of privacy and 'respect for privacy'. In *Pfeifer*, the Court says it includes 'psychological integrity'. But what does this mean? A capacity to suffer embarrassment because others know the truth? In *Von Hannover*<sup>17</sup> the Court talked of 'the development of the personality of each individual in his relations with other human beings'. What does this mean? If a public male figure consistently lies to the women he seduces, does this truth about his developing personality require covering up, even if the women seduced went to exercise their free speech

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rights? The Court goes on to locate 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life'.<sup>18</sup> What on earth does this formulation mean? How is a court to locate 'this zone of interaction...in a public context', the truth of which may be withheld from the public? Definitions like this are so intolerably vague that a restriction based upon them cannot be said to be 'prescribed by law'.<sup>19</sup>

The UK judges have done no better in defining privacy — indeed, their efforts have been even vaguer. In *R v Broadcasting Standards Commission, Ex p BBC*<sup>20</sup> Lord Mustill said:

*To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace or shell or umbrella or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolable.*<sup>21</sup>

This is entirely metaphysical: the media is to be punished for violating the 'carapace of a personal space' — a nonsense — and for 'affronting personality' which could include any critical comment, however true or any insult, however trivial or justified. Lord Hope has found that 'his reputation, his personality, the umbrella that protects his personal space from intrusion'<sup>22</sup> would mean that the appellant's privacy is invaded by a broadcaster pointing out the true fact that his DNA proved he was guilty of rape. It is extraordinary that the media had to go to the highest court to establish the simple fact that it was in the public interest to breach 'privacy' in order to publish evidence of a person's guilt of a serious crime. Although the Applicant's behaviour is not in this category and some would not even think it immoral, ironically, it could amount to a crime in English law of 'keeping a disorderly house', which is occasionally prosecuted and even punished by prison sentences: see *R v Cynthia Payne*.<sup>23</sup>

But the point is that cases like *Attorney-General's Reference (No. 3 of 1999)* may often be decided in favour of the media in the end, but the end is a Supreme Court where the costs orders, when they win, are only around 60% of the total they have paid and if they lose, they must pay the other side's costs, which usually total over £1 million.<sup>24</sup> So long as wealthy or 'conditionally fee'd' claimants can take the media to court (and because 'reputation' is an 'element' of an utterly vague concept of 'privacy', they can usually get in to court), the media faces heavy legal costs no matter how obviously incidental the story. The media simply cannot pay lawyers to contest every case where compulsory notification would inevitably be followed by an injunction.

Judges in the UK and in Europe are *insouciant* about legal costs: they think that the 'balancing act' between Article 8 and Article 10 is fine because public interest cases will usually win out at the end of the day. They do not comprehend the importance of being able to publish truthful information quickly and without legal inhibition, or the cost in editorial and journalistic time, quite apart from the cost of exorbitantly charging UK lawyers, in fighting for the right to publish.

If 'reputation' were no part of Article 8, and private information was properly defined, there might be an argument for a notice requirement, for example relating to medical records, sex with consenting partners who did not want to have the details published, photographs taken without consent in private places and so on. But the vast scope of the new law which is contended for — backed by a criminal sanction in the case of non-compliance — whenever the 'reputation' aspect of privacy or the 'carapace of psychological' well being is violated, is so vague as to be unworkable. Editors simply will not know whether to give notice or not, in relation to a vast range of newsworthy stories that will affect someone's reputation or someone's carapace of psychological wellbeing (which may depend on whether that someone has an 'eggshell' carapace, i.e. is likely to take offence easily).

The Applicant's case for compulsory pre-publication notification has been roundly rejected by the House of Commons *Press Standards, Privacy and Libel Report*.<sup>25</sup> It found the Applicant's suggestion to be unworkable and ineffective, because there would have to be a 'public interest' exception which would have permitted the editor in this case to avoid notice because he genuinely believed that there was a Nazi sex orgy (which would, apparently, have made the story of public interest<sup>26</sup>) and

had a statement from one participant purporting to confirm it. Even had notice been given and a hearing convened, the evidence would have been on affidavit and since the editor had a witness statement from witness 'A', the woman who organised the party and who purported to confirm the 'Nazi theme', he would have satisfied the pre-trial hearing test, i.e. Mr Mosley could not have shown that he was likely to succeed at trial (succeed he did eventually, but only after the witness "went to water" and refused at the last minute to testify on behalf of the newspaper).

The UK Parliamentary Select Committee points out, at para 87, that NGOs would be seriously and adversely affected by a pre-notice requirement. Global Witness, one such NGO which is party to this submission — repeats the point it made convincingly to the Parliamentary Committee, that a compulsory pre-notice requirement would, in relation to some of their reports (e.g. on Blood Diamonds) put staff and sources in danger.<sup>27</sup>

### **The Rule Against Prior Restraint**

The UK government had a positive and powerful obligation not to provide the Claimant with the power to go to Court to stop the press. This derives from Anglo-American history and tradition which is very different and much sturdier and more principled than European traditions of *lettres de cachet* and the Napoleonic insult laws, and which is summed up in the Duke of Wellington's reply to a journalist who gave notice, namely "Publish and be Damned!". The UK/Commonwealth/US rule is called *The Rule Against Prior Restraint* and is a fundamental right to publish, with any damnation coming later. It is hallowed by the great jurist Blackstone, who expressed it as follows:

*The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to law what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.*<sup>28</sup>

Blackstone's words were the basis for both British and American common law and the rule against prior restraint was affirmed by the US Supreme Court in its historic *Pentagon Papers*<sup>29</sup> decision:

*Any system of prior restraint on expression comes to this court bearing a heavy presumption against its constitutional validity. The only effective restraint upon executive police and power in the areas of national defence and international affairs may be an enlightened citizenry - informed and critical public opinion which alone can here protect the values of democratic government. For without an informed and free press there cannot be an enlightened people.*<sup>30</sup>

The rule against prior restraint has operated in libel cases in Britain for centuries.<sup>31</sup> It is modern and well-understood by litigants and was recently endorsed by the Court of Appeal in *Greene v Associated Newspapers Ltd.*<sup>32</sup> It would be wrong in principle and contrary to the Anglo-American tradition of freedom of speech for a UK government to require newspapers to notify (and thus invite injunction) whenever they plan to publish newsworthy information that may damage a reputation or arguably disrespect privacy. A notification requirement would destroy the rule against prior restraint and reverse the long line of case law that prevents a pre-publication injunction being granted in a libel action where the newspaper is prepared to defend on public interest grounds.

Notwithstanding what is said above, we note that the Court, without hearing argument, is already infected with the Article 8 and Article 10 'balancing' approach, which we contend is fundamentally wrong and which repeals the approach under Article 10 laid down in *Handyside*<sup>33</sup> and *Sunday Times*. The manner in which the Court has framed question 2(b)) assumes that there is a 'balance' between 'the interests protected under Article 8' and the freedom guaranteed by Article 10. In the *Sunday Times* case, the Court stressed that there was no 'balance': there was a presumption in favour of Article 10 and 'reputation' was a subsidiary right which had to be narrowly interpreted and firmly established. (The only occasion for 'balance' is where a genuine Article 8 right is involved, i.e. an intimate personal detail or confidential information about home and family life). Question 3 assumes that Article 8 was legitimately engaged in this case. The only extent to which it was engaged was in the

secret filming of a private party. The use of a surreptitious surveillance device may be deplorable and something for which the victim can be awarded damages, but it is not information that can be made subject to a notice requirement. That 'information' was simply that a wealthy public figure so enjoyed beating women, and being beaten by them, that he paid a large sum of money to savour this experience with five prostitutes. The judge found that this was 'private' information, although it had nothing to do with family and home life, and any personal details were hardly intimate since they were exhibited to five women.

It is almost always overlooked by complainants and by courts that Article 8 does not guarantee a right to privacy. It guarantees a right to respect for private and family life. What respect did Mr Mosley show for his own private and family life by disporting himself with five prostitutes, whom he paid to share his otherwise private sado-masochistic fantasies and to watch him ejaculate? He took the risk that any one of those five, who all knew who he was, might choose to talk or to publish an account of his gluttony for punishment. He complains that he was given no notice of publication, and of course it is accepted that the newspaper published a serious defamation of him: they said he had indulged in a Nazi sex orgy whereas he had only indulged in a British sex orgy. Had he sued in defamation, he would have been entitled to compensatory and aggravated damages (aggravated of course by the lack of notice) awarded by a jury. But he did not have to go before a jury — in the UK, the ultimate arbiter on questions of free speech - he sued in privacy which removes the right to trial by jury in favour of the newspaper. His receipt of £60,000 for damages from the judge has served to vindicate his position as a decent person without the slightest interest in Nazi themes; he has exposed the incompetence of the News of the World journalists; he now tours the country as a scourge of the tabloid press and makes himself available for flattering profiles in other sections of the press. He has, of course, suffered embarrassment (although his attraction to *le vice anglais* is not unusual in English men) and mortification at the exposure of his private pleasure but, this did not unseat him from his pre-eminent position in the sport of motor racing. His damages and costs award was adequate compensation for the newspaper's disrespect for his private life.

It is Mr Mosley's fundamental contention that without a notice requirement to enable victims to put the genie back into the bottle, they have no effective remedy. This argument fails to take on board the fact that once information is 'out' — especially out in newspaper offices — it cannot effectively be bottled. It will spread as rumour, and it will go up on internet blog sites, social media such as twitter and the fact of the injunction may make people think that the information is 'worse' than it really is. Moreover he has the 'just satisfaction' of having been vindicated in court - with the consequent enhancement of his dignity and public standing, and the consequent contempt (from media groups in particular) towards *News of the World*, which did not even appeal the decision.

It is idle for the Complainant's lawyers to go on at length about the 'commercial incentives' of the press. 'Responsible journalism' is a defence in libel cases but not in privacy (another rank unfairness is protecting 'reputation' under Article 8) but as the leading case of *Jameel*<sup>34</sup> recognises, there is no absolute obligation to notify the defamee so as to enable him to take out an injunction.

In paragraph 25, the Applicant says there is 'universal support amongst both academics and the judiciary' for the view that an injunction is the only effective remedy. This is not correct for the reasons given above, but in any event the examples given are not statements in favour of compulsory pre-publication notification. The notion that 'claimants with resolve and financial resources are likely to be few and far in between' is nonsense. The prospect of obtaining heavy and tax free damages, through lawyers operating on conditional fee arrangements with 100% uplifts, will encourage claimants who have suffered any gross privacy incursion. Indeed it has been widely reported that a number of persons who had their phones illegally bugged by a *News of the World* reporter have sued for damages, with the paper paying £700,000 in settlement to one litigant and a million to another. Sums of this size are a real deterrent to privacy invasion.

**Margin of Appreciation**

In any event, there must be a very considerable margin of appreciation permitted to states in relation to Article 8.<sup>35</sup> What amounts to a respect for private life is very much a matter for domestic notions of morality (see *Wingrove v United Kingdom*<sup>36</sup>) and for the democratic process. It will be appreciated that questions of privacy protection have been regularly debated in the UK Parliament in recent years, and have been the subject of two reports by Sir David Calcutt, regular reports by the Press Complaints Commission and most recently by the House of Commons Culture and Sport Committee.

A law of privacy is being developed by the judiciary, and will of course be honoured by the media. A notice requirement imported by a court which knows collectively nothing about British traditions of ‘publish and be damned’ — about John Milton and *Areopagitica*, about John Wilkes and Tom Paine and Blackstone and Bentham and the rule against prior restraint — should not upset a local tradition that has for centuries protected freedom of speech. There is no European consensus on privacy, or on notice requirements, in any event. And there is no certain standard of morality: some would regard the Claimant’s activity as morally questionable, whilst others would regard him as not bad for his age. The French are culturally amused at English infantile sexuality such as spanking fetishes said to develop in male public schools; the English deride a state that uses privacy laws to stop its citizens from hearing that fact that its President has an illegitimate child and a son involved in an illegitimate arms trade. The Swedes find British tabloids disgusting; the British find Swedish newspapers terminally boring. There is no ‘universal bottom line’, other than that children, family and home life always deserve protection and that well established categories of information (like personal medical records, diary contents, intimate personal relations with partners or details divulged to professional counsellors) should be safeguarded. Any wider privacy law is a matter for national laws based on national morals and attitudes to privacy.

**GEOFFREY ROBERTSON QC DOUGHTY STREET CHAMBERS 23 March 2010**

**Notes**

1. *Golder v United Kingdom* (1975) 1 EHRR 524.
2. *Sunday Times v United Kingdom* (1979) 2 EHRR 245.
3. *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153.
4. *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241.
5. *Silver v United Kingdom* (1983) 5 EHRR 347.
6. *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.
7. *Bowman v United Kingdom* (1998) 26 EHRR 1.
8. *Financial Times v. United Kingdom*, Application No. 821/03 of 15 December 2009.
9. Human Rights Committee Concluding Observations, 30 July 2008, UN Doc. CCPR/C/GBR/CO/6.
10. *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 271. See also *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153 at para 55.
11. Professor Velu in Robertson, *Privacy and Human Rights* (1973), 15-18.
12. *Radio France and Others v France* (2004) 40 EHRR 29.
13. *Chauvy v France* (2005) 41 EHRR 29.
14. *Karako v Hungary* (Application No. 39311/05), unreported, 28 April 2009.
15. *Pfeifer v Austria* (2007) 48 EHRR 175, 183, para 35.
16. In the UK case law, companies have been held to have privacy rights, for example, to sue to protect confidentiality: see *X Ltd v Morgan Grampian (Publishers) Ltd* [1990] 2 W.L.R. 421 (CA) per Lord Donaldson.
17. *Von Hannover v Germany* (2005) 40 EHRR 1.
18. *Von Hannover*, para 50.
19. *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, at paras 31-39.
20. *R v Broadcasting Standards Commission, Ex p BBC* [2001] QB 885 (*‘R v BSC’*).
21. *R v BSC*, para 48 per Lord Mustill.
22. *Attorney-General’s Reference (No. 3 of 1999)* [2000] 3 WLR 1164, para 22.
23. *R v Payne (Cynthia)* (1980) 2 Cr. App. R. (S.) 161.
24. The costs of *Jameel v Wall Street Journal* [2007] AC 359 (HL) after a three week trial, three days in the Court of Appeal and two days in the House of Lords, amounted to £2.28 million of which only £1.346 million was recovered.
25. House of Commons Culture Media and Sport Committee Report, ‘Press Standards, Privacy and Libel’, Second Report of Session 2009-2010, Volume 1, published 24 February 2010.

26. But this is questionable. Eady J assumed that there would be public interest in the revelation if the Nazi fetish element were proved, but why should this be so? If there is a privacy right to keep one's sexual fetishes to oneself and to act them out with willing (even if paid) partners, why should it matter whether the fantasies involved schoolgirls or nurses or Nazis or women from Mars, so long as they are consenting adults?
27. See Press Standards, Privacy and Libel Report, para 87 and Evidence, 241-2.
28. William Blackstone, *Commentaries on the Laws of England* (1975), Book IV, 151-2.
29. *New York Times v. U.S.*, 403 U.S. 713 (1971).
30. *New York Times v. U.S.*, 403 U.S. 713 (1971) at 729.
31. *Bonnard v. Perryman* (1891) 2 Ch. 269 (justification); *Quartz Hill Consolidated Mining v. Beal* (1882) 20 Ch. D. 501 (privilege); *Fraser v Evans* (1969) 1 Q.B. 349 (fair comment).
32. *Greene v Associated Newspapers Ltd* [2005] QB 972.
33. *Handyside v United Kingdom* (1976) 1 EHRR 737.
34. *Jameel and others v Wall Street Journal Europe Sprl* [2007] AC 359.
35. See the recent decision in *A v Norway*, Application No. 28070/06, Judgment of 9 April 2009.
36. *Wingrove v United Kingdom* (1997) 24 EHRR 1.

## Testing the Limits of the Telephone Consumer Protection Act *Does the Law Apply to Text Messaging?*

By Bryan Clark and Blaine Kimrey

Since the Ninth Circuit's June 2009 decision in *Satterfield v. Simon & Schuster*, 569 F.3d 946 (9th Cir. 2009) ("*Satterfield II*") — holding that the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), applied to unsolicited text messages advertising a new Stephen King book — plaintiffs have filed an increasing number of putative class action lawsuits against businesses and agencies that use mobile marketing as part of their advertising and sales campaigns.

One example is *Abbas v. Selling Source*, Case No. 09-cv-03413 (N.D. Ill.), which initially was dismissed without prejudice on *Twombly/Iqbal* grounds, ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)) see 2009 WL 4884471, \*2 (N.D. Ill. December 14, 2009), and eventually settled after the defendant moved to dismiss the amended complaint. Although the court dismissed the original complaint in *Abbas*, Judge Joan Gottschall's opinion contained *dicta* regarding the application of the TCPA to text messages that likely will serve as fodder for additional cases against companies engaged in text-message marketing. (Plaintiffs' attorneys have already cited the *Abbas dicta* in at least one other case — *Lozano v. Twentieth Century Fox*, Case No. 09-cv-6344 (N.D. Ill.), quoting extensively from the *Abbas* opinion in

response to the defendant's motion to dismiss.)

This article will explore the current landscape of TCPA text-message litigation, explain the strategies employed by defense counsel in the *Abbas* case, and examine the problems with the court's treatment of the text message issue in *Abbas*.

### I. TCPA Text-Message Landscape

In a typical TCPA text-message case, the plaintiff alleges that he or she received one or more unauthorized text messages — also known as text-message spam. Based on these text messages, the plaintiff brings a lawsuit on behalf of himself and putative class members who received similar text messages. These complaints often assert a count for violation of the TCPA, arguing that a text message is a "call" under the TCPA.

The TCPA states, in relevant part, that:

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone

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number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A)(iii). An “automatic telephone dialing system” (or “autodialer”) is defined as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). Notably, the statute does not define the term “call” and makes no mention of text messages, which did not exist at the time the statute was passed. *See Satterfield II*, 569 F.3d at 954 (“[T]his law was enacted in 1991 when text messaging was not available.”).

For the TCPA to apply to text messages, a court must determine that 1) a text message is a “call” within the meaning of the TCPA, 2) the call was made using an “automatic telephone dialing system” within the meaning of the statute, and 3) the call was made “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.” Because the TCPA contains no language specifically applying the statute to text messages, each court ruling is important. To date, there are only five reported decisions nationwide addressing whether the TCPA applies to text messages: *Satterfield II*; *Abbas*; *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831 (Ariz. App. 2005); *Satterfield v. Simon & Schuster, Inc.*, 2007 WL 1839807 (N.D. Cal. June 26, 2007) (“*Satterfield I*”) (rev’d by *Satterfield II*); and *Pollock v. Island Arbitration & Mediation, Inc.*, 869 N.Y.S.2d 740

(N.Y. City Ct. 2008). Of these five, *Satterfield II*, *Abbas*, and *Joffe* found that the TCPA applied to text messages. But *Satterfield I* and *Pollock* offer compelling arguments that the TCPA does not apply to text messaging in the manner argued by the TCPA plaintiffs’ bar. Moreover, as discussed below, the *Abbas* reasoning may have been subject to reversal on appeal and was *dicta*.

## II. *Abbas v. Selling Source* – Procedural Posture

The *Abbas* case is an excellent example of the type of cookie-cutter litigation that the TCPA plaintiffs’ bar has pursued against mobile-marketing entities around the country. In *Abbas*, the named plaintiff’s initial complaint alleged that he received numerous text messages over the course of

several months from an SMS short code allegedly licensed and operated by Selling Source. *See* Complaint (“Compl.”) at ¶¶ 13-18. But the plaintiff set forth in detail the date and contents of only one message. Compl. at ¶¶ 13-15. The plaintiff then alleged on information and belief that Selling Source had sent similar messages to more than 1,000 class members and that Selling Source had done so using equipment that had the capacity to store or produce telephone numbers to be called using a random or



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sequential number generator. Compl. at ¶¶ 21, 25.

Selling Source moved to dismiss the complaint because 1) *Abbas* failed to meet the federal pleading requirements of Fed. R. Civ. P. 8(a)(2) in light of *Twombly/Iqbal*, 2) *Abbas* failed to allege that he was charged for the text message he received, which is required to state a claim under the TCPA, 3) *Abbas* failed to allege that an automated telephone dialing system was used to send the text messages, 4) a text message is not a “call” within the meaning of the TCPA, 5) application of the TCPA to text messages would violate the First

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Amendment, and 6) application of the TCPA to text messages would render the statute void for vagueness under the Due Process Clause. *Abbas*, 2009 WL 4884471 at \*2. The court granted dismissal with leave to amend under Rule 8(a)(2), stating that the plaintiff's "broad, conclusory allegations regarding 'numerous' further messages . . . provide no notice to Selling Source about the subsequent messages Abbas allegedly received." *Id.* However, the court then took the curious approach of analyzing each of the remaining five grounds for dismissal and finding against Selling Source, even though the complaint had been dismissed as inadequately pled. It is this portion of the opinion, discussed in greater detail below, that should be of particular concern to attorneys who may be defending TCPA text-message claims.

The plaintiff responded to the court's dismissal by filing an amended complaint that simply deleted all references to the subsequent messages allegedly received by the plaintiff. *See* Docket Entry 37. The court had ordered Abbas to plead: when he received any subsequent messages, what those messages stated, and from what numbers he received those messages. 2009 WL 4884471 at \*2. Rather than providing that minimal level of detail as to the alleged subsequent messages, the plaintiff chose to reduce his complaint to a single text message. Selling Source renewed its motion to dismiss, incorporating its earlier arguments by reference and raising new concerns about the plaintiff's inability or unwillingness to plead the information required by the court (Docket Entry 45), but the case settled before that motion was fully briefed.

### III. *Abbas v. Selling Source* – Legal Posture

Although it is arguably an impermissible advisory opinion and is not binding in any court, the *Abbas* opinion is noteworthy because it is the first opinion to discuss all six of the arguments raised by Selling Source. Moreover, an analysis of the court's opinion reveals some of the inherent problems with applying the TCPA to text messages.

A. *A charge should be required to state a claim under the TCPA.*

In *Abbas*, the Court reasoned that a charge was not a necessary element of a claim under the TCPA. 2009 WL 4884471 at \*3 ("[T]he court finds that the TCPA does not require that a party called via a number assigned to a cellular

telephone service must be charged for the call to make that call actionable."). This is significant because it appears to be the first published court decision nationwide squarely addressing this issue. Such a ruling is contrary to the only FCC authority on point, which says a charge is required. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 F.C.C.R. 8752, 8775 (Oct. 16, 1992) ("1992 Report and Order") ("[W]e conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged."); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14115 (July 3, 2003). The FCC's position is consistent with the wording of Subsection (b)(1)(A)(iii) of the statute, which says:

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charge for the call.

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). If a charge were not required, 47 U.S.C. § 227(b)(1)(A)(iii) would not have two "or's" in the list. In other words, the first "or" is superfluous if "or any service for which the called party is charged for the call" does not modify every preceding category of service.

The court's opinion on the "charge" issue rejects deference to the FCC and rests almost completely on a technical amendment that was passed in 1992 without explanation by Congress. That amendment allowed the FCC to exempt calls to telephone numbers assigned to cellular services that are not charged to the called party. 2009 WL 4884471 at \*3. "If uncharged calls were already exempted from the requirements of the TCPA, as the FCC's 1992 Order

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and Selling Source maintain, the later congressional amendment would be wholly superfluous, as no FCC ‘rule or order’ would be necessary to exempt such calls from the statute’s purview.” *Id.*

However, that amendment has never been interpreted by the FCC and has never been interpreted by any other court. The language cited by the court in *Abbas* is a technical amendment, which federal courts have shown an unwillingness to apply in a manner that will undermine substantive policy determinations. See *U.S. v. Electronic Data Systems Federal Corp.*, 857 F.2d 1444, 1447 (Fed. Cir. 1988) (“[W]e are **loath to give a technical amendment substantive effect** that would undermine the Postal Service’s independence that ‘was a part of Congress’ general design that the Postal Service “be run more like a business than had its predecessor, the Post Office Department.””) (emphasis added); *Drax v. Ashcroft*, 178 F. Supp. 2d 296, 308 (“Technical Amendments are by nature non-substantive.”). Given that the TCPA was intended to address Congressional concerns about advertisers shifting costs to consumers, there is no need for regulation if the customer is not being charged for a call.

*B. A text message should not be considered a “call” under the TCPA.*

In *Abbas*, the court found that the term “call” under the TCPA “might encompass an SMS message” despite holding that the term is not defined by the TCPA, that the term is ambiguous, and that FCC interpretations of the term are entitled to no deference. 2009 WL 4884471 at \*4-\*7. In three brief sentences after acknowledging the ambiguity, the court noted the *Satterfield II* reasoning that text messages can be transmitted between phones and that the TCPA is intended to apply to telemarketing, and the court concluded based on that reasoning that a text message is a call under Section 227(b)(1)(A)(iii). *Id.* at \*7. Of course, the same logic would have Section 227(b)(1)(A)(iii) apply to emails transmitted between phones (for instance, one can use an iPhone, BlackBerry, or similar device to transmit and receive emails). Such an interpretation would be an unprecedented broadening of the TCPA. The court’s logic essentially would lead to application of Section 227(b)(1)(A)(iii) to any form of communication between digital devices, no matter how far removed those technologies are from the original conceptions

of Congress in passing the TCPA in 1991 and no matter how little the communications have to do with analog telephony.

The key to this debate may be whether the term “call” was meant to describe a specific activity or a category of activities. Selling Source reasoned by analogy from Justice Holmes’ logic in *McBoyle v. United States*, 283 U.S. 25, 26 (1931), in which the U.S. Supreme Court reversed the Tenth Circuit and found that reference to “motor vehicle” in the National Motor Vehicle Theft Act did not encompass airplanes. Selling Source argued that as the term “motor vehicle” did not conjure up the notion of an airplane in the 1930s, the term “call” did not conjure up the notion of a text message in 1991 (or, for that matter, to this day. If someone asks you today to “call” him or her, nine people out of 10 — if not more — would expect an oral phone call, not a text message). In that sense, Selling Source argued that the term “call” was referring to a specific activity.

But Judge Gottschall’s opinion rejected this interpretation, citing *Squillacote v. United States*, 739 F.2d 1208 (7th Cir. 1984). In *Squillacote*, the Seventh Circuit made an off-handed reference to “media” encompassing “television” and “motor cars” encompassing “Volkswagens.” *Id.* Judge Gottschall relied on this guidance to hold that “the nonexistence of SMS messages when the TCPA was enacted does not preclude the application of the latter to the former.” 2009 WL 4884471 at \*5. But these analogies are not equivalent. In today’s lexicon, there would be little doubt that television is a type of media and Volkswagen is a type of motor car. However, a text message is not clearly a type of call. *McBoyle* arguably provides the better analogy because it is equally unclear whether an airplane would fall in the motor vehicle category.

*C. Mere capacity to autodial should not be sufficient to state a claim under the TCPA.*

The court in *Abbas* reasoned that “the plain text of the statute requires only ‘the capacity’ for such random and sequential generation . . . and the implementing regulations impose no higher burden.” *Id.* at \*4. However, the FCC has consistently reasoned that the TCPA applies only when the equipment in question is actually used to autodial. For instance, the FCC stated in 1992 that “the identification requirements will not apply to debt collection calls because **such calls are not autodialer calls (i.e., dialed using a**

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**random or sequential number generator).** . . .” 1992 Report and Order at 8773 (emphasis added). The FCC further reasoned that “[t]he prohibitions of § 227(b)(1) [which includes the autodialer provision] **clearly do not apply to functions like ‘speed dialing,’ ‘call forwarding,’ or public telephone delayed message services (PTDMS), because the numbers are not generated in a random or sequential fashion.**” *Id.* at 8776 (emphasis added).

Consistent with this logic, the district court in *Satterfield I* found an autodialer was not used in that case because “the equipment at issue sent messages to a specific, finite, non-random and non-sequential list of numbers belonging to [Defendant’s] subscribers.” 2007 WL 1839807 at \*4.

Likewise, the *Pollock* court found that “[s]ince the plaintiff did not establish that the defendant used a dialing system which randomly or sequentially generated telephone numbers, the plaintiff cannot establish that the defendant placed a call to a cellular telephone using an automatic telephone dialing system pursuant to 47 U.S.C. § 227(b)(1)(A)(iii).” 869 N.Y.S.2d at 745.

Moreover, even if the plaintiff need only show the capacity to autodial, he must do more than simply parrot the language of the statute. In *Abbas*, the court reasoned that the plaintiff met this burden by, *inter alia*, alleging that Selling Source had sent “mass transmissions of wireless spam.” 2009 WL 4884471, \*3.

However, in the plaintiff’s first amended complaint, this allegation was dropped as the plaintiff reduced his allegations to a single text message. If the case had moved forward, the first amended complaint may have been inadequate to state a claim under the TCPA.

*D. The TCPA, if applied to text messages, would violate the First Amendment.*

In *Abbas*, the court found that the TCPA, as applied to text messages, was a valid content-neutral time, place and manner restriction on speech because:

- 1) the TCPA’s application to text messages served a significant government interest in limiting the nuisance and invasion of privacy caused by telemarketing,
- 2) the TCPA’s application to text messages was narrowly tailored to achieve this goal because the interest would be achieved less effectively absent the regulation, and
- 3) the TCPA’s application to text messages left open ample alternative channels for telemarketing. *Id.* at \*7-\*8.

As to the first prong of the time, place, and manner test (significant government interest), Congress has never articulated an interest in application of Section 227(b)(1)(A)(iii) to text messages. See *Horina v. City of Granite City, Illinois*, 538 F.3d 624, 633 (7th Cir. 2008) (holding that government failed to present evidence satisfying first prong); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1555-56 (7th Cir. 1986) (overturning nighttime solicitation ban because city failed to present objective evidence tying nighttime solicitation to city’s interest in preventing crime).

Of course, the congressional history preceding the TCPA and its amendments contains absolutely no reference to text messages. Nor does the TCPA itself contain any reference to text messages. 47 U.S.C. § 227. And the court relied solely on a vague “privacy” interest to hold that text messages, whether commercial or not and no matter where received, sufficiently implicate that interest. 2009 WL 4884471 at \*7-\*8.

Such invocation of a vague interest without evidence showing the interest is indeed served by a specific regulation does not satisfy the first prong. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1039 (7th Cir. 2002) (invalidating ban on solicitation outside hockey arena where city failed to offer substantive evidence tying ban to fraud and disruption of traffic).

Furthermore, the court’s ruling on the narrow tailoring prong ignores the differences between the TCPA’s prohibition on unsolicited faxes and its prohibition on calls using an automated telephone dialing system. The fax-spam provision applies only to commercial speech, whereas the autodialer provision covers both commercial and non-commercial speech. Thus, application of the TCPA to text messages would restrict not only commercial text messages, but also any core First Amendment speech sent by a system with the mere capacity to dial numbers in a random or sequential order.

For example, a political candidate might mobilize her constituency by sending text messages. A church might spread its message by sending text messages to its congregation. A newspaper might send text message alerts of breaking news to its subscribers. A nonprofit entity might remind its membership of an upcoming fundraiser via text message. In fact, one of the partners at the plaintiff’s firm in

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*Abbas* recently identified another public service that would fall within the wide net cast by the court's interpretation of the TCPA autodialer provision: class notice via text message. See Amy E. Bivins, *Communication Technology Trends Pose Novel Notification Issues for Class Litigators*, 78 U.S.L.W. 2450, 2451 (Feb. 2, 2010) (“[KamberEdelson partner Jay] Edelson said that parties should avoid notice systems involving text messages to mobile devices. ‘People should not be sending SMS notices. It sounds creative, but it could violate the TCPA.’”).

With respect to the third prong (alternative means), the court's reasoning actually highlights the problem with finding that mere capacity to autodial is sufficient to state a claim. The court's analysis refers to “[a]utomated dialers seeking to avoid the strictures of the TCPA,” 2009 WL 4884471 at \*8, but the court's decision actually targets anyone using a system with the *mere capacity* to autodial, no matter whether that capacity is in fact used.

That is why the court's interpretation of the TCPA does not leave open sufficient alternative channels of communication; it essentially constrains mass text messaging as a form of communication altogether (whether commercial or not and regardless of whether an autodialer is in fact used to transmit).

Moreover, just as forcing a handbill purveyor to engage in person-to-person or mail solicitation is constitutionally infirm, *Horina*, 538 F.3d at 635-36, so is forcing a mass text message sender to engage in other “live methods of communication,” as suggested by the Court.

*E. The TCPA, if applied to text messages, would be void for vagueness under the Due Process Clause.*

As to the Due Process question, the court in *Abbas* found that its interpretation of the statute — including text messages in the definition of “call” and requiring mere capacity to autodial — derives from a straightforward reading of the statute. 2009 WL 4884471 at \*9.

But with regard to the autodialer interpretation, *Satterfield I* and *Pollock* came to different conclusions regarding the meaning of the statute on this point. 2007 WL 1839807 at \*6 (“The Court concludes that the plain language of the statute does not allow the Court to divorce ‘to store’ from the ‘random or sequential number generator,’ as Plaintiff suggests.

Rather, the phrase ‘random or sequential number

generator’ modifies ‘store,’ ‘produce’ and ‘called.’”); 869 N.Y.S.2d at 745 (“Since the plaintiff did not establish that the defendant used a dialing system which randomly or sequentially generated telephone numbers, the plaintiff cannot establish that the defendant placed a call to a cellular telephone using an automatic telephone dialing system pursuant to [the TCPA].”).

Moreover, from a Due Process notice standpoint, the first decision to find that mere capacity to autodial was sufficient was published in 2009 (*Satterfield II*), and the allegations in the *Abbas* complaint dated back to 2006. Up until 2009, the only case law on point (*Satterfield I* and *Pollock*) found actual use was required.

As to the “call” question and Due Process, the court found that FCC interpretations and a single 2005 Arizona appellate court decision should have provided Selling Source sufficient notice to avoid a Due Process challenge. 2009 WL 4884471 at \*9.

However, the court earlier in its opinion found that the FCC interpretations were entitled to no deference and acknowledged that the term “call” in the TCPA is ambiguous. *Id.* at \*5-\*6. Additionally, federal courts have held that only extrinsic evidence that *narrows* the meaning of a statute (rather than broadening it) should be considered under the void for vagueness doctrine. *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 133 F.R.D. 531, 540 (1990). The court in *Abbas* did not address this argument.

#### IV. Conclusion

The unparalleled popularity of text messaging makes mobile marketing an attractive alternative for media companies everywhere, but it is not without its risks. Until there is some favorable case law for defendants, these TCPA cases are likely to be filed in increasing numbers. Despite the issues with the *Abbas* opinion that are discussed above, TCPA plaintiffs will undoubtedly continue to rely on Judge Gottschall's opinion in future TCPA text-message cases. To properly defend these cases, attorneys should be prepared to address the problems with *Abbas* and renew the various arguments against application of the TCPA to text messages.

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# Ethics Corner: Putting The Genie Back

## *What To Do When Your Client Has Stolen Documents*

By **Ronald C. Minkoff & Amelia K. Seewann**

It's one of the toughest ethics questions a lawyer can face: what to do when a client embroiled in a dispute with a former employer presents purloined (but helpful) documents? If the lawyer tells the employer, the client could get in serious trouble, and the case could be lost. But if the lawyer keeps silent or (worse) reviews the documents, the consequences can be equally severe. In both cases, the lawyer and the client find themselves at serious risk.

The ethics rules do not squarely address this no-win situation but, along with a growing body of case law, they do provide some guidance. In this article, we will first discuss a lawyer's ethical obligations upon receipt of improperly obtained materials. Second, we will discuss whether a court may prohibit a client from using the improperly obtained materials in an adversarial proceeding against the employer or impose other sanctions. Finally, we conclude with suggested steps for lawyers to follow in this situation that will allow them to comply with their ethical responsibilities while also vigorously representing the interests of their clients.

### The Relevant Ethics Rules

A lawyer representing a client who has improperly obtained documents from his or her employer must begin by reviewing the applicable rules and bar opinions in the relevant jurisdiction. The Model Rules of Professional Conduct (the "Model Rules") do not contain a rule specifically addressing this situation. Nevertheless, those rules, as adopted by the various states, are often invoked by courts and disciplinary authorities to impose obligations upon the lawyer-recipient.

#### Model Rule 4.4

A lawyer confronted with improperly obtained documents might first turn to [Model Rule 4.4](#), which governs a lawyer's duty to respect the rights of third persons and appears at first blush to address the situation. This appearance is deceiving. For example, subsection (a) of the rule provides, in pertinent part:

(a) In representing a client, a lawyer shall

not . . . use methods of obtaining evidence that violate the legal rights of [a third] person.

This rule only prohibits a *lawyer* from using methods of obtaining evidence that violate the rights of another. It does not explicitly apply where the *client* procured the evidence by violating another's rights. Though Model Rule 4.4(a) does not explicitly apply, some bar opinions have interpreted the rule to implicitly prohibit a lawyer from *reviewing* the improperly obtained documents, apparently because once the lawyer reviews the documents, the lawyer is deemed to be "us[ing] methods of obtaining evidence."

Subsection (b) of Model Rule 4.4 also appears applicable, but is not. It states:

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was *inadvertently* sent shall promptly notify the sender.

As we will show below, the ABA and state bar ethics opinions interpreting this rule conclude that it does not apply where the documents were not sent inadvertently, but instead were misappropriated and sent deliberately to the attorney.

The Comments to Model Rule 4.4 mention our scenario, but only to point out that the Model Rules do not cover it. In a 2006 ethics opinion (Formal Op. 06-440), the ABA Standing Committee on Ethics and Professional Responsibility (the "ABA") opined that the Model Rules do not impose any ethical obligations on the attorney in this situation. In that opinion, the ABA withdrew a 1994 ABA ethics opinion that set forth guidelines for lawyers who receive "on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential." The 1994 ethics opinion had stated that a lawyer receiving such materials had to take several steps, including:

(a) refraining from reviewing materials which

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are probably privileged or confidential . . . ; (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents; (c) following the instructions of the adverse party's lawyer; or (d), in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

In Formal Opinion 06-440, the ABA noted that this earlier opinion found no basis in the Model Rules, but was based instead on various common law principles and the importance of protecting the attorney-client privilege. While noting that these principles "are part of the broader perspective that may guide a lawyer's conduct in [this] situation, . . . they are not . . . an appropriate basis for a formal opinion of this Committee, for which we look to the Rules themselves." It then determined that a lawyer receiving improperly obtained documents – *i.e.*, documents obtained intentionally – did not have to follow Model Rule 4.4(b) because that rule applies only where the sender's conduct was inadvertent. Intentional misconduct, the opinion said, was a matter of law outside the scope of the Model Rule 4.4(b). In making this ruling, the opinion did not suggest that a lawyer is under no obligation whatsoever to notify the adverse party or to refrain from reviewing the documents; rather, it stated that the language of Model Rule 4.4 does not itself impose those requirements.

#### Model Rule 8.4

The more general provisions of [Model Rule 8.4\(b\)](#) and (c), which prohibit a lawyer from engaging in criminal or dishonest conduct, have also been applied to the purloined document scenario. Even where there is no finding that the conduct was illegal or dishonest, a lawyer may still violate Rule 8.4(d), which prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice." As discussed below, courts are more likely to impose sanctions where the improperly obtained documents contain information to which the client or the advocate would not otherwise have had access – *i.e.*, information which is privileged, work product or proprietary.

#### Additional Rules

Bar opinions from several states have cited a variety of

other ethical precepts to support ethical duties to, among other things, return or disclose the documents. For example, a Florida bar opinion stated that a lawyer would have to produce the improperly obtained documents in response to a valid discovery request. Additionally, if the documents themselves were stolen property, then ethical rules and/or substantive law may require the lawyer to turn over the documents.

Countering this, and showing how painful this dilemma can be, the very same bar opinions remind the lawyer to be mindful of ethical obligations owed to the client. These obligations include the duty to abide by a client's decisions concerning the objectives of the representation and the duty of confidentiality.

But these opinions do provide helpful advice. The Florida opinion stated that a lawyer must first determine whether the documents are stolen or contraband, and whether he or she has a legal obligation to disclose them or turn them over to the police. Even if the documents are not themselves contraband, the opinion continues, "the inquiring attorney must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue," and must withdraw from the case if the client refuses.

The Pennsylvania Bar Association approached the situation a bit differently. Opinion No. 2008-02 (2008) states that the lawyer must first determine whether there is a risk of criminal or civil liability because of the way the documents were obtained and, if there is, and if the client insists on using the documents, the lawyer should "seriously consider withdrawing from the representation." But if the only concern is whether the documents themselves are confidential, the lawyer should have them reviewed independently. If it turns out the documents can be used, and their use "will significantly advance the client's interests," then there may be an "affirmative duty" to make them part of the case.

### **The Relevant Case Law**

Courts reviewing cases involving the unauthorized receipt of another's documents generally find that the ethics rules do not exhaust the considerations that should inform a lawyer's conduct. These courts, obligated to protect the integrity of

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the judicial system, fill the gap left by the ethics rules through their inherent powers to sanction offending litigants and lawyers. Available sanctions include, among other things, dismissal of claims or defenses, disqualification of counsel, the suppression or limitation of evidence, and the imposition of court costs. In order to determine the appropriate sanction, if any, courts generally weigh two factors: (i) the severity of the wrongdoing; and (ii) the prejudice to the adversary. This analysis is fact-driven and courts make decisions on a case-by-case basis.

#### Dismissal of Claims

Dismissal of a claim or a defense based on discovery misconduct is a “harsh sanction.” It should be imposed only after the court carefully considers, among other things, the degree of the wrongdoer’s culpability, the consideration of lesser sanctions, and the prejudice to the other party. Absent extraordinary circumstances, courts are reluctant to dismiss a client’s case for discovery abuse because a court’s primary purpose is to resolve litigation based on the merits. Nonetheless, courts have dismissed actions where the client’s misconduct was particularly egregious and where lesser sanctions could not rectify the harm because the client had wrongfully gained access to otherwise unavailable information that prejudiced the adversary.

#### Disqualification of Counsel

Like dismissal of an action, disqualification of counsel is a severe sanction and generally should be limited to situations where counsel unfairly gained access to information that he or she would otherwise not have known. Courts are more likely to disqualify counsel where counsel reviewed and relied upon the documents in the prosecution of the client’s case than if the documents are either irrelevant or are excluded from use in the case under the attorney-client privilege or the work product doctrine.

Courts will also consider whether the lawyer acted in bad faith, and are less likely to disqualify a lawyer or impose other sanctions where the lawyer reviewed the relevant ethical guidelines and/or obtained ethics advice. Courts will also look to whether counsel responsibly handled the documents (*i.e.* segregated them and/or declined to review them) once he or she learned that the client obtained the documents under suspicious circumstances.

#### Suppression of Evidence

Courts vary in their approaches to motions to preclude inappropriately obtained documents. Where the documents

would otherwise have been subject to production in the litigation, some courts have imposed restrictions on the use of the documents for the remainder of the litigation. Other courts permit the offending party to use the documents, relying on the “inevitable discovery” doctrine, which allows evidence that was unlawfully obtained to be used in litigation if it could and would have been lawfully obtained anyway. Under this approach, the court may order the former employee to return the documents to the employer, who will in turn produce all relevant, non-privileged documents to the employee and may require the employee to pay the costs of any related motion practice.

The rationale behind this approach is that courts have an overarching responsibility to protect against the greater injustice that would result if documents that otherwise would be produced and admissible could not be considered in adjudicating the parties’ case.

### **Another Analogy – The Real Evidence Situation**

One more body of case law that may provide guidance here is that involving a lawyer’s receipt from a client of illegal contraband, such as a weapon or the proceeds of a crime. Courts have rejected efforts to claim that this action – the receipt of the contraband itself – is a privileged attorney-client communication. Nor will courts countenance destruction of contraband or other evidence, often finding that lawyers who do have committed obstruction of justice.

More nuance, however, is required to address situations where the lawyer located contraband based on communications with his or her client. If the lawyer simply observes the contraband, but does not remove it, that *observation*, being the product of an attorney-client communication, is deemed protected by the attorney-client privilege.

But if the lawyer does remove the contraband, *e.g.*, to test it, he or she is then obligated to reveal it to the prosecutor, and to disclose its original location and condition. The prosecutor, in turn, must present the evidence in a manner that does not reveal the content of the attorney-client communication that led to its discovery.

It does not appear that the principles applicable to real contraband have been applied to cases involving inappropriately obtained documents. Nevertheless, the contraband cases suggest that lawyers and their clients are

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safest if they do not take possession of, and do not view, the documents, and that lawyers can gain their clients a measure of protection (*i.e.*, a requirement that the other side not reveal at trial the confidential communications regarding the source) by voluntarily producing the documents.

### Conclusion and Practice Tips

In sum, though no ethics rules squarely apply to our situation, the lawyer receiving improperly obtained documents undoubtedly owes obligations to third parties and to the court. Given that the documents were purposely and improperly obtained by the client to aid in his or her case, those obligations must be stricter than those required under Model Rule 4.4(b) for *inadvertently* produced documents.

As one court has recently noted, “[t]he justifications underlying the protections afforded to inadvertent productions, however, apply with even greater, and stricter, force in connection with advertent but unauthorized disclosures.” Thus, the lawyer may well be obliged to provide notice to the owner of the documents and additionally may have to refrain from reviewing and/or using the documents, notwithstanding any concerns about maintaining client confidentiality. Moreover, though the case law on this topic is fact-specific, it is clear that various sanctions may be imposed on the client and the lawyer depending on the severity of the conduct involved and the content of the documents. These potential sanctions are only further reason for a lawyer to adopt a conservative approach.

When confronted with a situation involving improperly obtained documents, we suggest the following step-by-step approach:

- ◆ Do not read the documents, or have anyone on your office staff do so.
- ◆ Discuss the situation, including the ethical dilemma, with your client. Try to determine how the documents were obtained, and if they contain proprietary information, trade secrets or attorney-client confidences. If the client possibly committed a criminal act, the client may need to obtain advice from a criminal defense attorney.
- ◆ The attorney should also find out the client’s objectives

in the case, including whether the client would like to use the documents in the case. In doing so, the lawyer should inform the client of the potential risks involved, including the risk that the court may subject the client or the attorney to sanctions for their conduct if it finds that proper steps were not followed.

- ◆ If the client wishes to go forward with the case and the client does not want to disclose the documents to his or her adversary, the lawyer should segregate the documents and refrain from reviewing them. The lawyer may also wish to seek ethics advice from an independent lawyer to determine whether, based on the *independent lawyer’s* review of the documents, the client may review and/or use the documents in litigation.
- ◆ In the event that potential criminal or civil liability cannot be ruled out and the client persists in using the documents to advance the client’s case, the attorney should consider whether to withdraw from the representation.
- ◆ Alternatively, the lawyer can obtain the client’s permission to inform the opposing party that the lawyer has the documents, that they have been segregated and not reviewed, and that they will be returned on the understanding that the opposing party will (a) preserve them; (b) produce any responsive, non-privileged documents in discovery; and (c) provide a log of all privileged documents. If the opposing party does not agree, the lawyer may seek a court order.
- ◆ If there is any chance that the documents are originals or duplicates of documents that no longer exist, do not return them to the client. It is better to keep them segregated and unread than take the chance that the documents will be lost or destroyed, with the resulting risks of spoliation and obstruction of justice claims.

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**BANNERS, BEACONS, AND BEHAVIORAL TARGETING:  
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The conference begins with an in-depth look at how advertising technology works. We'll talk about ad serving, ad networks, cookies, web beacons, javascript, and flash cookies, consumer profiling, behavioral and contextual targeting, deep packet inspection, and the like. Then we'll have a wide-ranging discussion about current and emerging advertising revenue models with leaders in the digital advertising space (including discussion of hardware, new forms of advertising, and data mining).

**Panelists**

**Jon Hart**, Partner, Dow Lohnes PLLC, Moderator

**Matthew Carr**, General Manager, Microsoft Advertising

**Alissa Cooper**, Chief Computer Scientist, Center for Democracy & Technology

**Dave Hills**, General Partner, KPG Ventures

**Lincoln Millstein**, Senior Vice President for Digital Media, Hearst Newspapers

**ENTER THE LAWYERS: LEGAL ISSUES FOR  
INTERNET ADVERTISING TECHNOLOGY AND BUSINESS MODELS**

Increased focus on new business models, data mining, and targeting raise complex legal and policy issues related to privacy, liability, and transparency. Our panel of lawyers and government affairs professionals will highlight the important challenges related to protecting users' privacy while maximizing potential revenue streams. We'll also discuss the industry's efforts at self-regulation and potential government regulation of online advertising and targeting. Finally, we'll look at emerging legal theories that could be used to protect online publisher's content from unauthorized use by third parties.

**Panelists**

**Andy Mar**, Senior Attorney, MSN, Moderator

**Pam Horan**, President, Online Publishers Association

**Nicole Ozer**, Technology and Civil Liberties Policy Director, ACLU of Northern California

**Brian Pass**, Partner, Sheppard Mullin

**Halimah DeLaine Prado**, Product Counsel, Google

**ETHICAL ISSUES IN THE NEW WORLD OF JOURNALISM AND CONTENT DISTRIBUTION**

This panel will explore a host of ethical dilemmas, including issues raised by the potential paradigm shift in the funding of journalism, as well as the shift from relying on staff reporters to relying on independent journalists/bloggers. Additionally, the panel will explore the long-standing conundrum of reviewing/writing about products/services provided by major advertisers, with new twists in the online world and the blurred line between editorial and advertising content. Finally, we'll explore issues raised by corporate/journalist/blogger interactions with various social networking media.

**Panelists****Roger Myers**, Partner, Holme Roberts & Owen LLP**Dawn Garcia**, Deputy Director, John S. Knight Fellowships at Stanford**Evan Hansen**, Editor in Chief, Wired.com**Robert Rosenthal**, Executive Director, Center for Investigative Reporting**Eric Schuldt**, Vice President, International Legal and Compliance at CBS Interactive (fka CNET Networks)**GOVERNMENT POLICY DEVELOPMENTS: WHAT THE GOVERNMENT MAY DO TO YOU**

As traditional media outlets reinvent themselves and new outlets emerge and expand, questions arise about the appropriate direction for regulation and policy. Are current regulations fostering innovation and promoting competition? Is more or less regulation needed to ensure the viability of sources of news, information, and entertainment? In this session, industry and government experts will address new directions in digital media regulation, including those related to:

- ◆ **Advertising:** Panelists will discuss developments in law and regulation governing behavioral advertising, embedded advertising and related privacy issues.
- ◆ **Technical and Infrastructure Issues:** Congress and the FCC are evaluating how to promote and expand broadband availability, affordability, and adoption. How will their decisions affect the business plans of content providers, application developers, device manufacturers, and the wired and wireless infrastructure? Panelists will discuss developments concerning the National Broadband Plan, spectrum allocation, net neutrality, interoperability and related issues.
- ◆ **Future of Journalism:** Citing a potential crisis for traditional forms of journalism, both the FTC and FCC recently commenced comprehensive examinations of the state of media in the US. Panelists will discuss the concerns raised by the agencies and the challenges facing investment in hard journalism today.
- ◆ **Content:** Panelists will discuss how Congress, federal agencies, and international laws and agreements may change the rules for content on the Internet and other platforms.

**Panelists****Erin Dozier**, Associate General Counsel, National Association of Broadcasters, Moderator**Pablo Chavez**, Managing Policy Counsel, Google**Elizabeth Hammond**, Vice President and General Counsel, Nexstar Broadcasting**Sherrese Smith**, Legal Advisor to Chairman Genachowski, Federal Communications Commission**Joe Waz**, Senior Vice President, External Affairs and Public Policy Counsel, Comcast Corporation**DO I NEED PERMISSION FOR THAT?: COPYRIGHT,  
FAIR USE, THE DMCA, AND NEW OPEN LICENSING MODELS**

Among the first ultimatums of the Twenty-First Century to content distributors is: Collaborate and connect or commoditize. This terse mandate unpacks to include Copyright, Fair Use, the DMCA, Open Licensing Models as broad topics and more specifically includes, among many others, Veoh, Cablevision, MP3, BitTorrent, class actions as privatized proxy legislation, and gardens of content accessed by pay walls.

As the initial irrational optimism of the internet wanes, we settle into knowing the web as the internetworked constellation of disruptive technologies. This panel will address the issues of 'radical sharing' and discuss how competitive advantage in content distribution is re-aligning with emerging new measures of success and value.

#### **Panelists**

**Kate Spelman**, Partner, Cobalt LLP, Moderator

**Anthony Falzone**, Executive Director/Fair Use Project, Center for Internet & Society, Stanford Law School

**Kirsty Melville**, President and Publisher, Andrews McMeel Publishing, Book Division

**Steve Tapia**, Senior Attorney/Copyright & Trade Secret Group, Microsoft

### **LEGAL FRONTIERS IN BLOGGING, SOCIAL NETWORKS AND THE INTERNET**

This panel will discuss a myriad of topics, including

- ◆ Revisiting consumer criticism and gripe sites in light of new CDA and Lanham Act case law
- ◆ New copyright and DMCA decisions involving BitTorrent and UGC sites and their impact on law and business developments
- ◆ Latest law on preemption of third party IP claims
- ◆ The \$30 Million + jury verdict in Louis Vuitton Malletier v. Akanoc Solutions, Inc. and its impact on secondary trademark liability
- ◆ Potential investor liability
- ◆ Circuit splits and other differences in the law applied in different venues

#### **Panelists**

**Ian Ballon**, Partner, Greenberg Traurig, Moderator

**Dan Cooper**, Vice President,  
Business & Legal Affairs at MySpace, Inc.

**Zahavah Levine**, General Counsel & VP  
Business Affairs, YouTube, Inc.

**Corynne McSherry**, Senior Staff Attorney and Kahle Promise Fellow  
Electronic Frontier Foundation

**Michael Richter**, Deputy General Counsel  
for IP, Product and Regulatory, Facebook

**Ben Sheffner**, Production Counsel at NBC Universal  
and author of the blog "Copyrights & Campaigns"

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